160 US 101

Not this case but later same parties

RECORD, CASE No 14,030.

160-101

THE LAW ASSOCIATION OF PHILADELPHIA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

TERM No, ~~101~~ 20 4

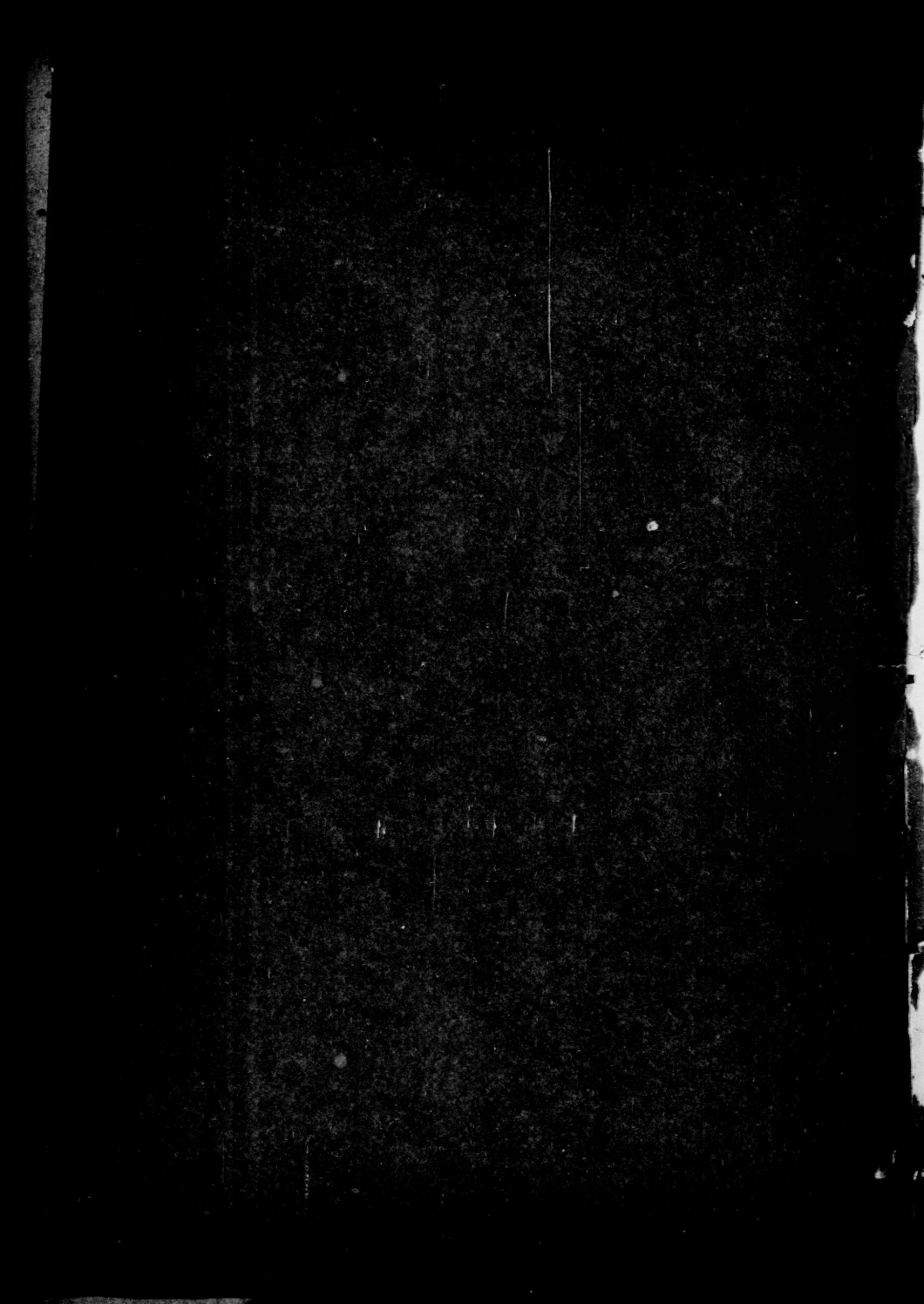
THE WASHINGTON AND IDAHO RAILROAD COMPANY, APPELLANT,

vs.

THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED MAY 9, 1890.



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1 THE UNITED STATES OF AMERICA:

To the Cœur d'Alene Railway & Navigation Company *et al.*, respondents:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the supreme court of the Territory of Idaho, in open court, on the — day of March, 1889, and duly entered on the records of said court, wherein The Washington and Idaho Railroad Company is appellant and you, the said The Cœur d'Alene Railway & Navigation Company *et al.*, *is* appellee-, to show cause, if any there be, why the judgment entered and rendered in this case by the supreme court of the Territory of Idaho on the 19th day of March, 1889, against the appellant, should not be reversed and the errors therein corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Hugh W. Weir, chief justice of the supreme court of the Territory of Idaho, this 28 day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

H. W. WEIR,
Chief Justice of the Supreme Court of Idaho Territory.

Attest:

[Seal Supreme Court, Idaho Ter.]

S. H. HAYS,
Clerk Supreme Court, Idaho Ter.

We do hereby acknowledge due service of the foregoing citation this 18th day of September, 1889; also the bond on appeal; also the affidavit of W. B. Heyburn as to value, copies of all of which are herewith served and accepted.

ALBERT ALLEN,
Counsel for the Def't and Respondent in this Cause in the Supreme Court.

2 [Endorsed:] Washington & Idaho R. R. Co. *vs.* The Cœur d'Alene Railway & Navigation Co. *et al.* Citation.

3 Supreme Court, Idaho Territory, January Term, 1889.

WASHINGTON AND IDAHO RAILROAD COMPANY, Appellants,
vs.
CŒUR D'ALENE RAILROAD & NAVIGATION CO., Respondents.

Appeal from first district, Shoshone Co.

Woods & Heyburn, attorneys for appellants.
Albert Allen, and Wm. H. Clagett attorneys for respondents.

Filed Jan. 10th, 1889.

A. L. RICHARDSON, *Clerk*,
By B. S. PRICKETT, *Deputy*.

4 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

Pleas begun, continued, and held in the district court of the first judicial district of the Territory of Idaho in and for Shoshone county, before the Hon. John L. Logan, district judge, on the 5th day of September, A. D. 1887, and judgment rendered in open court by and before said judge of said court on the 5th day of January, A. D. 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

Be it remembered that on the 5th day of September, A. D. 1887, the plaintiff filed its complaint in said action; which said complaint is in words and figures as follows, to wit:

5 In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

The above-named plaintiff, complaining of said defendants, alleges:

First. That said plaintiff now is and ever since the 5th day of July, A. D. 1886, has been a corporation duly organized and existing under the laws of the Territory of Washington for the purposes, among others, of constructing, equipping, operating, and maintaining a railroad and telegraph line from the town of Farmington, in Washington Territory, by the most practical route in a generally northerly direction to a point at or near the town of Spokane Falls, in said Washington Territory, and from a junction with said line near the forks of Hangman creek, in said Washington Territory, in a generally northeasterly direction across the Cœur d'Alene Indian reservation to a point near the mouth of St. Joseph river, on Cœur d'Alene lake; thence in a northerly direction along the east side of Cœur d'Alene lake to the Cœur d'Alene river; thence in a generally easterly direction to the Cœur d'Alene mission; thence in a southeasterly

direction by the valley of the South fork of the Cœur d'Alene
6 river, via the town of Milo, in Idaho Territory, and continuing from said town of Milo, in Shoshone county, in Idaho Territory, following the South fork of the Cœur d'Alene river about twenty miles to the town of Mullan, in said Territory of Idaho, and also a like railroad and telegraph line from said Mullan, in Idaho Territory, in an easterly direction by the most practical route across the Bitter Root mountains to Missoula, in the Territory of Montana, a distance of about one hundred miles.

Second. That this plaintiff has heretofore, in compliance with the laws of Idaho Territory, duly designated and appointed a person residing in Nez Perce county, in said Idaho Territory, it being the county in which the principal place of business of said corporation in said Idaho Territory is conducted, upon whom process issued by authority of or under any law of said Idaho Territory may be served, and has duly caused said designation and appointment to be filed in the office of the secretary of said Idaho Territory and in the office of the clerk of court for said county of Nez Perce and has in all respects complied with the law of said Idaho Territory respecting foreign corporations transacting business therein.

Third. That in pursuance of the said objects of its incorporation, for the purpose of obtaining a right of way over the public domain of the United States wherever its said railroad should traverse the same, this plaintiff, on the 23rd day of December, A. D. 1886, duly filed with the Hon. Secretary of the Interior, at Washington, in the District of Columbia, a copy of its articles of incorporation and due proofs of its organization under the same, together with a
7 duly certified copy of the law of said Territory of Washington under which said corporation was organized, and in all respects duly complied with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" and the rules and regulations of the Hon. Secretary of the Interior thereunder, by reason whereof this plaintiff, on the said 23rd day of December, A. D. 1886, became entitled to survey, locate, construct, operate, and maintain its said railroad through and across the public lands of said United States along its said route of railroad and to acquire a right of way for such railroad of a strip of land to the extent of one hundred feet in width on each side of the central line of its said railroad through all public land along said route as granted by said act of Congress.

Fourth. That for the purpose of obtaining such right of way granted as aforesaid the plaintiff caused the central line of its said railroad to be surveyed from said Farmington to said point near the forks of said Hangman creek and thence along the said course heretofore described to said town of Mullan; that said central line of route of said railroad as so surveyed was at the time of making such survey marked upon the ground by stakes such as are usually employed by surveyors of railroad lines, driven in the ground at the end of each one hundred feet of said line, commencing at said Farmington and extending thence along said surveyed route to

said forks of said Hangman creek and thence along said surveyed route to said town of Mullan. Each of the said stakes denote a station of one hundred feet, and each of said stakes was numbered and marked in the manner usual with surveyors of rail-
8 road lines; that in all places when necessary along said surveyed line stakes called plus stakes, marked respectively with a plus sign, were driven in the ground between said one-hundred-foot stakes, and that said central line of route of said railroad as so surveyed and marked upon the ground was surveyed and marked upon the ground in the usual and customary way of surveying and locating the line of route of railroads, and the same at all times has been and is readily to be observed and traced upon the ground; that said surveyed route was duly adopted by this plaintiff as and for its definite survey and location of its said line of route of its said railroad; that the work of so surveying the first section of said survey, beginning at said Farmington and extending to said forks of Hangman creek, a distance of eleven and $\frac{5}{10}$ miles, was begun August 30th, A. D. 1886, and completed September 11th, A. D. 1886; that the survey of the second section of said route of survey from said forks of Hangman creek to the western boundary line of the Cœur d'Alene Indian reservation, a distance of two and $\frac{1}{10}$ miles, began September 13th and was completed September 16th, A. D. 1886; that the survey of that section or portion of said surveyed line beginning near the Old Mission and extending along said Cœur d'Alene river and the South fork thereof to a point at or near Osborne, a distance of twenty miles, was begun September 25th, A. D. 1886, and completed October, 22nd, 1886; that the survey of that section of said surveyed line beginning at or near said Osborne and extending thence to said Mullan, a distance of twelve and $\frac{8}{10}$ miles, was begun October 22nd, 1886, and completed November 3rd, 1886; that immediately after each of said sections of survey was made this plaintiff caused correct maps or profiles thereof respectively to be
9 made, which were respectively duly verified by the affidavit of P. Zahner, the chief engineer of said plaintiff (borne on such maps), and signed by him officially agreeably to the rules and regulations of the Hon. Secretary of the Interior in the premises, and in each of which affidavits it was set forth that such survey was made by said affiant, P. Zahner, as the chief engineer of said plaintiff, under the authority of said plaintiff, and giving the termini and distance of each of said sections respectively, and also the said respective dates between which each of said surveys was made, and also stating that each of said surveys was made, and also stating that each of said surveys was accurately represented on said maps respectively. Each of said maps also had bearing thereon the official certificate of the president of said plaintiff, attested by its secretary, under its corporate seal, regarding the said P. Zahner, the person signing the said affidavits, that he was at all such times the chief engineer of said plaintiff, and that said surveys respectively were made under the authority of said plaintiff, and also that the line of route so surveyed and so represented by said maps respectively was adopted by the said plaintiff by resolutions of its board of directors

of dates respectively December 2nd, 1886, and December 24th, A. D. 1886, as the definite location of the line of route of plaintiff's said railroad, said certificate on said map of said first section starting from said Farmington to a point near the forks of said Hangman creek, a distance of eleven and $\frac{5}{10}$ miles; said certificate on said map of said second section starting from near said forks of Hangman creek to the Washington and Idaho boundary line, a distance of two and $\frac{1}{10}$ miles; said certificate on said map of said third section starting from the eastern boundary of Cœur d'Alene reservation, near the Old Mission, to a point near Osborne, on the South fork of said Cœur d'Alene river, a distance of twenty miles, and said certificate on said map of said third section starting from said point near said Osborne to said Mullan, a distance of twelve and $\frac{1}{10}$ miles, as the termini of said actions respectively, and each of said certificates further setting forth that the said map to which it related had been prepared to be filed for the approval of the Secretary of the Interior, in order that the plaintiff might obtain the benefits of said act of Congress approved March 3d, A. D. 1875.

That immediately upon the location of said sections respectively of the line of route of its said railroad and the said verifying and certifying the same plaintiff filed said matters respectively with the register of the land district in which said section of said railroad was located, to wit, the maps of said first two sections with the register of the land office at Spokane Falls, he being the register of the land district of the United States in which said two sections of said railroad are situate, and the maps of said last two sections with the register of the United States land office at Cœur d'Alene, Idaho, he being the register of the land district of the United States in which said last two sections of said railroads are situated, and that thereafter said maps or profiles were duly transmitted to the Hon. Secretary of the Interior and were duly and unconditionally approved by him, and such approval endorsed thereon respectively as follows: that of said section of eleven and $\frac{5}{10}$ miles January 12th, A. D. 1887; that of two and $\frac{1}{10}$ miles January 12th, A. D. 1887; that of said section of twenty miles March 5th, A. D. 1887, and that of said section of twelve and $\frac{8}{10}$ miles February 7th, A. D. 1887; that by reason of the premises aforesaid the said plaintiff on November 3d, 1886, and ever since has been and is the owner of a right of way through all public lands to the extent of one hundred feet on each side of the central line of its said railroad as the same was so surveyed from said point near said Old Mission to said Mullan, and that all lands through which said line of road is so surveyed and located between said points are now and at all times prior hereto have been unsurveyed public lands of the United States; that this plaintiff is still engaged in surveying and locating the line of route of its said railroad from Mullan easterly to said Missoula, its eastern terminus, and is engaged in the construction and in preparations for the construction of the said railroad on its surveys and designated route.

That said defendant, The Cœur d'Alene Railway and Navigation Company, claims to be a corporation created under the laws of

Montana and to be engaged in the construction of a steam railway from, at, or near said Old Mission along the valley of the South fork of Cœur d'Alene river to a point easterly of said Mullan; and plaintiff on his information and belief alleges that said defendant, George P. Janes, heretofore has been and is the engineer in charge of the construction of said defendant's railway; that for the purpose of annoying and harassing plaintiff and obstructing it in and preventing it from constructing its said railroad and for unlawfully appropriating said right of way to the use of defendants said defendants have conspired together, and in pursuance of said conspiracy, on or about the first day of August, A. D. 1887, unlawfully and forcibly and against the consent
12 of plaintiff went upon all that portion of said right of way and line of route of this plaintiff at said town of Wallace and for a continuous distance easterly and westerly therefrom, making in all a distance of a mile and a half, and with large numbers of men and teams forcibly and unlawfully took possession and occupancy thereof and in like manner began the construction of a railroad thereon for the length thereof and are still continuing such unlawful and forcible possession and occupancy and construction, and by reason thereof are preventing plaintiff from the possession and use thereof and from constructing or being able hereafter to construct its railroad thereon, and are by means of said acts and threatened acts destroying plaintiff's said right of way and rendering the same totally unfit for plaintiff's railroad and will continue and consummate all of said threatened acts and objects unless restrained by authority of this court.

That the said acts of defendants so complained of, unless restrained and prevented during the pendency of this action, will cause plaintiff great and irreparable injury and damage, and that the acts of the defendants above complained of are in violation of the plaintiff's rights respecting the subject of this action, and if continued will render any judgment obtained by plaintiff against defendants herein ineffectual.

Wherefore plaintiff prays the judgment and decree of this court enjoining said defendants, their and each of their servants, agents, and employees and all persons acting or claiming to act under the authority or direction of either of them, from in any manner entering upon the said right of way of plaintiff at the town of Wallace and for a continuous distance easterly and westerly there-
13 from, making in all a distance of a mile and a half, and being a space one hundred feet in width on each side of the central line of the railroad of plaintiff as surveyed and designated on the ground at the said place, and from further constructing said railroad on said right of way and from in any manner interfering with plaintiff in the peaceable and exclusive possession and occupancy thereof and in the construction of its railroad thereon, and that the paramount right of plaintiff in the ownership, use, and enjoyment of its said right of way be decreed by this court and that defendants be excluded from all right therein, and for such other and further relief as to the court may seem meet and equitable, the

premises considered, together with the costs of this action, and that upon a final and further hearing thereof a perpetual injunction be issued restraining the defendants as aforesaid from doing or procuring to be done the acts and things herein complained of.

And they will, etc.

ALLEN, CROWLEY AND STEARNS AND
W. B. HEYBURN, *Attorneys for Plaintiffs.*

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

Julius Galland, being first duly sworn, says that he is the secretary of the Washington and Idaho Railroad Company; that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

14 JULIUS GALLAND.

Subscribed and sworn to before me this 2nd day of September, A. D. 1887.

H. F. GUDE,
Justice of the Peace in and for said County.

(Endorsed:) In district court, Shoshone county. The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, defendants. Complaint filed this 5th day of Sept., A. D. 1887. Fred E. Lucas, clerk, by Geo. M. Cone, deputy. Allen, Crowley and Stearns and W. B. Heyburn, attorneys for plaintiffs.

And afterwards and on September 5th, 1887, the affidavit of P. Zahner was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

15 THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

P. Zahner, being first duly sworn, deposes and says—

That he is over the age of twenty-one years and is by profession a civil engineer and is the chief engineer of said plaintiff in charge of surveying and locating its line of railroad and has been in the employ of said plaintiff as such engineer for several months last past; that said plaintiff has heretofore surveyed the central line of

its railroad from a point near the Old Mission, on the Cœur d'Alene lake, along the valley of the South fork of the Cœur d'Alene river to the town of Mullan, in Shoshone county, in said Territory of Idaho, and the same is and has for a long time past been plainly marked and indicated upon the ground by stakes driven therein at the end of each consecutive hundred feet, numbered and marked as is customary and usual with railroad surveyors and engineers, and, when necessary, by intermediate stakes placed between said hundred-feet stakes, called and marked plus stakes; that affiant is familiar with said survey and the official maps and profiles thereof as approved by the Hon. Secretary of the Interior, and that said maps were verified by affiant as such chief engineer of plaintiff.

16 That by means of said stakes and the evidences upon the ground the central line of route of said survey is plainly visible and can and is easily traced upon the ground; that said line of survey as so indicated passes along and through the town of Wallace, in said Shoshone county, approaching the same in its course from a westerly and passing beyond in an easterly direction; that this affiant is familiar with the said survey and line of route of said plaintiff where the same passes through Wallace and above and below the said town; that he is also familiar with the line of railroad survey of said defendant, Cœur d'Alene Railway and Navigation Company, at and near said Wallace and easterly and westerly therefrom, as staked, marked, and located upon the ground, and the same is a practical route for a narrow-gauge railroad when so abandoned, and that the same deviates from that of said plaintiff at said points as much as from one hundred feet to six hundred feet, and that each of said surveys is plainly visible and trac-able; that at said Wallace and immediately easterly and westerly therefrom, making a distance of about one and one-half miles, the said defendant, Cœur d'Alene Railway and Navigation Company, has abandoned its said surveyed and located line of road, and that said defendant, George P. James, who is engineer in charge of construction of said defendant, The Cœur d'Alene Railway and Navigation Company, with a large force of men, to wit, about one hundred, and many teams, has gone upon the said line of survey and right of way of said plaintiff and with great energy and haste is constructing the road-bed of a railroad thereon and apparently uniting portions of railroad of said Cœur d'Alene Railway and Navigation Company already constructed easterly and westerly of said gap; that

17 in said work of constructing said Janes has the necessary material, as this affiant is informed and believes, to complete said railroad along and on said space; that in such construction the line of survey of said Cœur d'Alene Railway and Navigation Company has been abandoned and that of said plaintiff has been appropriated; that the railroad of plaintiff is a standard gauge, while that of said defendant is a narrow gauge, and said Janes is so constructing said railroad on the surveyed right of way of plaintiff as to render the same wholly unfit for the use of plaintiff and to prevent plaintiff from constructing its railroad thereon; that said

Janes, though warned not to do so, is continuing and will, as this affiant is informed and believes, continue such work until he has constructed the railroad of the defendant along the whole length of said space in and upon the said survey and right of way of plaintiff, and wholly ignores the right of way and survey of said plaintiff.

P. ZAHNER.

Subscribed and sworn to before me this 2nd day of September, A. D. 1887.

H. F. GUDE,
Justice of the Peace in and for said Shoshone County.

18 Endorsed: In district court, Shoshone county, Idaho Territory. The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, defendants. Affidavit of P. Zahner. Filed Sept. 5th, 1887. Fred. E. Lucas, clerk, by George M. Cone, deputy. Allen, Crowley and Stearns and W. B. Heyburn, plaintiff's attorneys.

And afterwards and on September 5th, 1887, plaintiffs filed affidavit of W. H. Burrage, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

19 TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

W. H. Burrage, being first duly sworn, deposes and says that he is by profession a civil engineer, and is the engineer of said plaintiff in charge of construction, and has been in the employ of said plaintiff as such engineer for several months last past; that said plaintiff has heretofore surveyed the central line of its railroad from a point near the Old Mission, on the Cœur d'Alene lake, along the valley of the South fork of the Cœur d'Alene river to the town of Mullan, in Shoshone county, in said Territory of Idaho, and the same is and for a long time past has been plainly marked and indicated upon the ground by stakes driven therein at the end of each consecutive hundred feet, numbered and marked as is customary and usual with railroad surveyors and engineers, and, when necessary, by stakes intermediate said hundred-feet stakes, called and marked plus stakes.

That affiant is familiar with said survey and the official maps and profiles thereof as approved by the Hon. Secretary of the

Interior; that by means of said stakes and the evidences upon the ground the central line of route of said survey is plainly visible and can be easily traced upon the ground; that said line of survey as so indicated passes along and through the town of Wallace, in said Shoshone county, approaching the same in its course from a westerly and passing beyond in an easterly direction; that this affiant is familiar with the said survey and line of route of said plaintiff where the same passes through Wallace and above and below the said town; that he is also familiar with the line of
20 railroad survey of said defendant, Cœur d'Alene Railway and Navigation Company, at and near said Wallace and easterly and westerly therefrom as staked, marked, and located upon the ground, and the same is a practical route for a narrow-gauge railroad where so abandoned, and that the same deviates from that of said plaintiff at said points as much as from one hundred to six hundred feet, and that each of said surveys is plainly visible and traceable.

That at said Wallace and immediately easterly and westerly therefrom, making a distance of about a mile and a half, the said defendant, Cœur d'Alene Railway and Navigation Company, has abandoned its said surveyed and located line of road, and that said defendant, George P. Janes, who is the engineer in charge of construction of said defendant, The Cœur d'Alene Railway and Navigation Company, with a large force of men, to wit, about one hundred, and many teams, has gone upon the said line of survey and right of way of said plaintiff, and with great energy and haste is constructing the road-bed of a railroad thereon and apparently uniting portions of railroad of said "The Cœur d'Alene Railway and Navigation Company" already constructed easterly and westerly of said gap.

That in said work of construction said Janes has the necessary material, as this affiant is informed and believes, to complete said railroad along and over said space; that in such construction the line of survey of said Cœur d'Alene Railway and Navigation Company has been abandoned and disregarded, and that of said plaintiff has been appropriated.

That the railroad of plaintiff is a standard gauge, while that of said defendant is a narrow gauge, and said Janes is so constructing said railroad on the surveyed right of way of plaintiff
21 as to render the same wholly unfit for the use of plaintiff and to prevent plaintiff from constructing its railroad thereon.

That said Janes, though warned not to do so, is constructing and will, as this affiant is informed and believes, construct such work until he has constructed the railroad of defendant along the whole length of said space in and upon the said survey and right of way of plaintiff, and wholly ignore the right of way and survey of said plaintiff.

Affiant further says that on the 23d day of August, 1887, he personally delivered to said Janes a notice, of which a copy, marked "A," is attached to this affidavit and made a part thereof.

W. H. BURRAGE.

Subscribed and sworn to before me this 2nd day of September, A. D. 1887.

H. F. GUDE,
Justice of the Peace in and for Shoshone County.

"A."

ENG.'s CAMP, W. & I. R. R. Co., *Aug.* 23*d*, 1887.

To George P. Janes, engineer in charge Cœur d'Alene Railway and Navigation Company.

DEAR SIR: You and all parties in your charge or in the employ of the Cœur d'Alene Railway and Navigation Company are hereby notified that the Washington and Idaho Railroad Company, a corporation organized under the law of Washington Territory and authorized to transact business in Idaho Territory, has heretofore duly filed complete maps of its branch line from Old Mission to Mullan, Idaho, under the act of Congress approved March 3rd, 1875, entitled "An act granting right of way to railroads through the public lands," and having complied with the rules and regulations of the Hon. Department of the Interior, the said maps were duly approved by the said department and a right of way through the public domain secured by said company.

22

Therefore you and all servants, employees, and privies of the Cœur d'Alene Railway and Navigation Company are warned to desist from occupying any portion whatever of the said Washington and Idaho Railroad Company's right of way as the same is staked out and surveyed, and as shown by its said maps now on file.

THE WASHINGTON AND IDAHO RAILROAD CO.,
By W. H. BURRAGE, *Eng'r in Charge.*

Endorsed: In district court, Shoshone county, Idaho Territory. The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, defendant-. Affidavit of W. H. Burrage. Filed Sept. 5th, 1887. F. E. Lucas, clerk, by George M. Cone, deputy. Allen, Crowley and Stearns and W. B. Heyburn, plaintiff's attorneys.

23

And afterwards and on October 26th, 1887, answer of the defendant The Cœur d'Alene Railway and Navigation Company was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

Now comes The Cœur d'Alene Railway and Navigation Company, one of the defendants in the above-entitled action, and answering the complaint of the plaintiff herein—

First. Alleges that this defendant is now and ever since the 6th day of July, 1886, has been a corporation duly organized and existing under the laws of the Territory of Montana, for the purpose of constructing and operating a steam railway from a point known as the Old Mission, in Kootenai county, Idaho Territory,
24 and running thence up the valley of the Cœur d'Alene river and the South fork of the Cœur d'Alene river, and thence by the most practicable route to the town of Thompson's Falls, in the Territory of Montana.

Second. That on the 20th day of July, 1886, for the purpose of securing the right of way over the public lands for such railroad, this defendant duly filed with the Secretary of the Interior, at Washington, D. C., a copy of its articles of incorporation and due proofs of its organization under the same, and in all respects complied with the act of Congress approved March 3rd, 1875, entitled "An act granting right of way through the public lands," whereby and by reason whereof this defendant, on said 6th day of July, 1886, became and ever since has been and now is authorized to survey, locate, construct, operate, and maintain its said railroad through and over the public lands along said route of railroad and to acquire a right of way for such railroad of a strip of land one hundred feet on each side of the central line of its said railroad through all public lands along said route as granted by said act of Congress.

Third. That for the purpose of securing to it the right of way granted by said act of Congress through the public lands, this defendant caused the central line of route of its said railroad to be surveyed from said Old Mission, in said Kootenai county, Idaho, to a point about five miles easterly from the town of Mullan, in the county of Shoshone, in said Idaho Territory, a total distance of thirty-five miles and six hundred and sixty-one feet, the
25 said line of route as so surveyed commencing at said Old Mission and running thence in an easterly direction up the valley of the Cœur d'Alene river to the town of Kingston, in said Shoshone county, and thence in an easterly direction up the valley of the South fork of the Cœur d'Alene river via the towns of Wardner Junction, Wallace, and Mullan, and to a point about five miles east of said town of Mullan, and that the central line of route of said railroad as so surveyed was marked upon the ground by stakes set in the ground into stations of one hundred feet, each of which stakes were numbered respectively, commencing at said Old Mission, and in all respects as is usual and customary in surveying for and locating line- of railroads, and that said survey was finally completed on or before the 5th day of November, 1886; that on the 19th day of July, 1886, this defendant filed in the office of the register of the land office at Cœur d'Alene, Idaho, being the district in which such line of route is situated, a map or profile of that portion of said central line of route as so surveyed from said Old Mission to said town of Wardner Junction, a distance of thirteen miles and 1,836 feet, and that on the 8th day of November, 1886, this defendant filed with said register of said land office a map or profile of that portion of said central line of route from said Ward-

ner Junction to the said town of Wallace, as so surveyed, being a distance of eleven miles and 1,600 feet, and that on the 9th day of November, 1886, this defendant filed with said register of said land office a map or profile of that portion of said central line of route as so surveyed from said town of Wallace to said point about five miles above said town of Mullan, being a distance of ten
26 miles and 2,505 feet, and that each of said maps or profiles were duly verified and certified in accordance with said act of Congress and the rules and regulations of the Department of the Interior in relation thereto, and were each of said last two maps duly approved by the Hon. Secretary of the Interior on the 3rd day of December, 1886.

Fourth. This defendant alleges that it has at great cost and expense and in the utmost of good faith constructed said railroad from said Old Mission to the said town of Wallace and at the time of the service of the injunction herein was operating the same, running cars thereon.

Fifth. That in making the said survey and locating the line of route of this defendant's said railroad as aforesaid the engineer of this defendant at and near said town of Wallace surveyed and marked upon the ground three different lines, which three lines are respectively shown upon the map and hereto attached and marked "Exhibit A" and made a part of this answer, and that said lines are respectively marked upon said map as "A," "B," and "C," said three lines being surveyed by said engineer in order to obtain the cheapest and most practicable route, and that said lines A and B depart from the general line of said railroad at a point about one-fourth of a mile westerly from said town of Wallace and cross the South fork of the Cœur d'Alene river and run through the said town of Wallace and then recross the said river and join the main line of said road at a point about one-fourth of a mile above said town of Wallace, while "C" line runs on the north bank of said river opposite the said town of Wallace, all of which will more fully appear by reference to said map.

27 Sixth. That it was the intention of this defendant to adopt as its permanent and definite line of road at and near said town of Wallace the said line so surveyed and marked upon the ground by its said engineer and now designated on the map hereto attached as line "C," but that by a mistake of the chief engineer of this defendant in platting the said maps or profiles so as aforesaid filed with said register of said land office the said line designated on the map hereto attached as line "B" was platted instead; that said mistake was not noticed by this defendant and was never discovered by it until after the service of the injunction herein, and that up to the said time this defendant supposed and believed that it had adopted as the definite line of its road at and near said town of Wallace the said survey running on the north bank of said river and designated on the map hereto attached as line "C," and that under said belief and prior to the commencement of this action and without any knowledge of said mistake this defendant at great cost and expense has fully graded its road over and along said line "C"

and laid the ties and rails upon about one-half thereof and has partly erected a depot or station-house and warehouse, and that the said construction by defendant of its said road and station-house upon and over said line "C" constitute and are the acts, wrongs, and injuries complained of by the plaintiff and none other.

Seventh. And this defendant alleges that the plaintiff ought not to be heard to complain or maintain this action for the following good and sufficient reasons, to wit: That the plaintiff, as this defendant is informed by the allegations of the complaint and
28 verily believes, did not file with the Secretary of the Interior a certified copy of its articles of incorporation and due proofs of its organization under the same until the 23rd day of December, 1886, and that it was not authorized prior to that time to make any survey for or do any act in locating a line of route of or in or toward the construction of a railroad over the public lands, and that the plaintiff has not since the said filing of its said articles of incorporation with the said Secretary of the Interior surveyed any line of route upon or entered upon or done any work upon or expended any money upon the said premises complained of, but, on the contrary, the plaintiff, through its engineers in charge of its works and business, with a full knowledge that this defendant was in good faith constructing a railroad, stood by and permitted this defendant at great expense to make and construct a grade for a railroad the entire length of said line "C" and to lay the ties and rails on a large part thereof, and yet did not make known to this defendant the fact that plaintiff claimed any rights in the premises whatever, or that it ever intended or expected to construct a railroad thereon; and this defendant alleges that if the plaintiff should ever build a railroad upon or over said line "C," as it is alleged in the complaint it intends to do, it can and will utilize a very large portion, if not all, of said work so as aforesaid done by this defendant; and this defendant alleges upon information and belief that the plaintiff stood by and did not make known to this defendant the claim of plaintiff and permitted this defendant to construct said road-bed and place
29 the ties and rails thereon in order to obtain the benefit thereof and thereby to greatly damage, hinder, and embarrass this defendant.

That in surveying the pretended line of railroad by plaintiff described in the complaint, although the same was surveyed long after the survey of this defendant's road and while this defendant was in good faith constructing its road, the plaintiff, wholly in disregard of the rights of this defendant, has so surveyed its said pretended road as in many places to cross and recross this defendant's road, and that at said town of Wallace and for more than one mile easterly and westerly thereof the valley of the said South fork of the Cœur d'Alene river is near if not more than one-fourth of a mile in width and part of which is practical for the construction of a railroad of any kind and over which a railroad such as plaintiff alleges it intends to build can be constructed cheaper and at less expense than over the premises complained of, and yet the plaintiff, wholly in disregard of the fact that there was ample room for the construction of

its said pretended railroad without crossing or interfering with the line of this defendant's road, unnecessarily caused its survey to be so made as to cross the line of this defendant's road at a point below the said town of Wallace and to recross the same at a point a short distance above the said town of Wallace, each of said crossings being made on a very acute angle and in such manner that if both of said roads shall be constructed and operated there will be great danger of railroad collisions and the lives of passengers traveling on said roads will be greatly endangered, and that said crossing and
30 recrossing of plaintiff's road at and near the said town of Wallace as aforesaid is without right and absolutely and wholly unnecessary and ought not in equity and good conscience to be allowed.

Wherefore this defendant prays a decree of this court that the claim of the plaintiff to a right of way over the premises described in the complaint as wrongfully occupied by this defendant be adjudged and decreed to be without right, and that the title thereto be forever quieted in this defendant, and that the plaintiff be estopped from claiming any right of way thereon, and that by reason of the acts of the plaintiff in standing by and permitting the defendant to construct its said road over the same without objection the plaintiff be decreed to have abandoned and forfeited all right, if any it ever had, thereto, and that the plaintiff by the decree of this court be required to so construct its road as not to cross the road of this defendant at or within one mile of the said town of Wallace, and for such other and further relief in the premises as to the court may seem just and equitable, together with the costs of this action; and the defendant will ever pray, etc., etc.

ALBERT ALLEN,
Attorney for the Defendant, The Cœur d'Alene Railway and Navigation Company.

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

D. C. Corbin, being duly sworn, says that he is the president of The Cœur d'Alene Railway and Navigation Company, one of the defendants in the above-entitled action: that he has heard
31 the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

D. C. CORBIN.

Subscribed and sworn to before — this 21st day of October, 1887.

WARREN HUZZEY,
[SEAL.] *Notary Public.*

Endorsed: # 293. District court, Shoshone county. The Washington & Idaho Railroad Company *vs.* The Cœur d'Alene Railway & Navigation Company *et al.* Answer. Filed Oct. 26th, 1887. F. E. Lucas, clerk. Albert Allen, def't's att'y.

And afterwards and on October 27th, 1887, plaintiff's answer to affirmative matter in def't's answer was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant.

Now comes the above-named plaintiff and, answering the affirmative matter pleaded in the answer of the above-named defendant in its answer herein filed, *and* alleges and denies—

That with a full knowledge or with any knowledge that the defendant was in good faith constructing a railroad — stood by and permitted the defendant at great expense to make and construct a grade for a railroad the entire length of the line "C" or any line and to lay the ties and rails on a large part thereof or on any part thereof and did not make known to the defendant the fact that plaintiff claimed any right in the premises, or that it ever intended or expected to construct a railroad thereon, but alleges the truth to be that on the 11th day of July, 1887, one George P. Janes, who was the engineer in charge of the defendant, wrote a letter to the plaintiff advising it that it was the intention of said defendant to construct its said road on its location as filed, and that on the 13th day of July, 1887, W. H. Burrage, who was and is the engineer in charge of the construction of the railway of plaintiff, gave
33 notice in writing to the said George P. Janes, engineer in charge of said defendant, that it was the intention of plaintiff to construct its road on the location as made and filed by it and referred said George P. Janes to the plat of the same then on file.

That at the time of such notice as aforesaid no work of construction or other work had been done on the line or portion of line marked on the map attached to defendant's answer or line "C."

That the location of the line of its road by plaintiff was made before and prior to the entry of defendants to locate or survey its said line "C;" that at the time of surveying and locating its line of road over the line "C" or the line in controversy there were no marks, stakes, posts, or evidence of location of a railroad on or along any part of said line or on the north side of the South fork of the Cœur d'Alene river, and in making said survey and location the plaintiff set stakes and posts such as are usually used to mark the line of location of a railroad and marked the same and, in addition thereto, cut out and cleared away the brush and trees along the line so located.

Deny that the defendants ever surveyed, located, or attempted to survey or locate any line or railroad on the north side of the South

fork of the Cœur d'Alene river prior to the survey and location of line of the road of plaintiff over the ground in controversy.

Deny that plaintiff can construct its line on the south side of said river between the points in controversy at a less or at an
34 equal expense compared with its cost of constructing its line on the north side of said river between said points, but, on the contrary, allege that the plaintiff would be put to great additional expense by reason of the ground on the south side of said river is covered by a town site and the property through which the line of the road would be constructed is owned by many different persons and right of way through the same could only be secured at great cost and expense, and in passing over such route it would be necessary to construct and maintain two bridges over said river beside the additional length of line and the additional curvature of line.

Denies that the crossing of one railroad over another at grade on the angle of departure indicated by the lines of location of the roads of plaintiff and defendant as shown by said plat would be dangerous or unusual.

Wherefore plaintiff prays judgment against the defendant, according to the prayer of the complaint on file herein, and that the relief therein prayed may be granted.

ALLEN, CROWLEY AND STEARNS AND
W. B. HEYBURN, *Att'ys for Plaintiff.*

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

George W. Truax, being duly sworn according to law, says that he is the president of the aforesaid corporation, plaintiff; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to those things therein stated on information and belief, and as to those things he believes it to be true.

35 GEORGE W. TRUAX.

Subscribed and sworn to before me this 26th day of October, 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

Endorsed: No. 293. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Washington & Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene R. & N. Co. *et al.*, defendant. Answer to affirmative matter in answer of defendant. Filed the 27th day of Oct., 1887. F. E. Lucas, clerk. W. B. Heyburn and Allen, Crowley & Stearns, attorneys for pl't'f.

And afterwards and on October 27th, 1887, affidavit of P. Zahner was filed, which is in words and figures as follows, to wit:

36 In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

TERRITORY OF IDAHO, *County of Shoshone,* } *ss.*:

P. Zahner, being duly sworn according to law, on his oath deposes and says that he is the chief engineer of the Washington and Idaho railroad and has been such for a year last past; that he knows when and where the line of the location of the railroad of plaintiff was made at the points in controversy in the above-stated action; that the line of the location of said railroad was made on the north side of the South fork of the Cœur d'Alene river, from the point where the line thereof last intersects the located line of the Cœur d'Alene Railway and Navigation Company's railroad, below the town of Wallace, to the point where said lines intersect above said town, as shown by the respective location maps filed by said parties prior to the location of the line indicated on the map attached to the answer of defendant-, on file herein as line "C," and that prior to and at the time of the location of said line of plaintiff's on said north side of said river no other line of railroad had ever been surveyed
37 or located on said north side of said river between said points by the defendants or any person; that the defendants made their survey and location of said line indicated as line "C" on said map after and while the line of survey and location of the road of the plaintiff was plainly staked in the manner usually adopted in making and staking such surveys and lines, and while the same was plainly indicated by a cleared line along said route so located; that he is acquainted with the angles at which said line as located by plaintiff crosses the line on which defendants filed their plat both below and above the town of Wallace, and that the angle of the same is an ordinary and usual angle for railroads to cross and is not dangerous to travel or operation of railroads; that he is acquainted with the nature of the ground on the south side of said river, and that the cost of constructing the plaintiff's road on said side of the said river between the points in controversy would be greatly in excess of constructing their said road on the route indicated in their plat filed, exclusive of the cost of obtaining the right of way through the town of Wallace, which intervenes between said points; that during all the time defendants were working upon the right of way of plaintiff this affiant was surveying in the Bitter Root mountains for said plaintiff, and he had no knowledge that defendants were trespassing upon such right of way.

P. ZAHNER.

Subscribed and sworn to before me this 27th day of October, 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

38 Endorsed: No. 293. In the district court of the first judicial district in and for Shoshone county. The Washington and Idaho R. R. Co., plaintiff, *vs.* The Cœur d'Alene R. & N. Co. *et al.*, defendant-. Affidavit of P. Zahner on injunction. Filed the 27th day of Oct., 1887. F. E. Lucas, clerk. W. B. Heyburn and Allen, Crowley and Stearns, attorneys for pl'ff.

And afterwards and on October 27th, 1887, affidavit of W. H. Burrage was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

39 TERRITORY OF IDAHO, *County of Shoshone,* } *ss:*

W. H. Burrage, being first duly sworn, deposes and says that he is by profession a civil engineer and is the engineer of the above-named corporation, plaintiff, and is in charge of the construction of the railroad of said plaintiff and has been in the employ of said plaintiff as such engineer for several months last past; that he knows where the survey of the line of the plaintiff's railroad was made and completed through the town of Wallace and for a distance of a mile above and below said town, and was present and knows where said line was located; that the same is in the main correctly shown by the plat attached to defendants' answer filed in said case, which affiant has seen and examined; that the line of plaintiff's survey as so indicated was plainly staked upon the ground in the manner usual to railroad surveys, and, in addition to such usual stakes and marks, said plaintiffs cut out and cleared a line over said route presenting an unobstructed view on and along the line of the same.

That on the 11th day of July, 1887, George P. Janes, engineer in charge for said defendant, served upon affiant, as the engineer in charge of plaintiff, a notice in writing, of which a copy is hereto annexed and made a part hereof, marked "Exhibit A;" that afterward and on the 13th day of July, 1887, and prior to the doing of any work by defendant by way of constructing any road or
40 railroad upon the route as shown on the map as aforementioned, affiant, as such engineer of plaintiff, served upon said Janes, as such engineer of defendant, a notice in writing, of which a copy, marked "Exhibit B," is hereto annexed and made a part hereof.

That defendant, in the construction of its road, constructed portions thereof lying to the westwardly of said portion of road and easterly thereof, engaging small squads of men on said easterly and westerly parts of said portion of said road, but when it came to con-

structing said portion of the road as on said map referred to defendant concentrated its forces to work upon said portion thereof.

That at the time of so commencing said work affiant, as the engineer in charge of plaintiff's road, was engaged on said plaintiff's road at a distance from said town of Wallace and his time and attention were fully occupied.

That about the 17th day of August, 1887, he saw defendant
41 at work in such a manner as to lead him to believe that defendants was abandoning its survey and passing on the said right of way of plaintiff.

That affiant immediately went to headquarters of plaintiff to make examination of maps in order to advise himself on said subject; that he was compelled to go ninety miles to make such investigation, and at once upon making the same served another notice in writing upon said Janes, engineer in charge for defendant, to desist from constructing the road of defendant on the line aforesaid.

That the said survey of plaintiff was made prior to the survey of the defendant indicated on said map as line "C" or to any survey of defendants on said line or on the north side of Cœur d'Alene river at said point, and at the time said survey "C" as indicated on said map was made all the indices of plaintiff's survey were plainly visable; that in addition to departing from the said line as aforesaid defendants have departed from and ignored their said line of location at points eastwardly and westwardly of said portion of said line.

That he is acquainted with the topography of the country and the nature of the ground at points where the road of plaintiff crosses the road of defendant at the points mentioned in the answer of defendant, and that such crossings are at grade in strict conformity with the request of defendant of July 11, 1887.

That after the service of the notice served on said Janes to desist as aforesaid the said Janes, for defendant, continued to grade and construct the road of defendants over said line, in utter
42 disregard of said notice, until restrained by order of the court.

That affiant is reliably informed and believes that — at all such times had a copy of the map of survey of plaintiff's route in its possession.

W. H. BURRAGE.

Subscribed and sworn to before me this 26th day of October, A. D. 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

(Copy.)

"EXHIBIT B."

ENG'R'S CAMP, W. & I. R. R. Co., *July* 13, 1887.

George P. Janes, Esq., engineer in charge C. d'A. R. & N. Co.

DEAR SIR: I have yours of the 11th inst. The Washington and Idaho R. R. Co., a corporation organized under the laws of Wash-

ington Territory and authorized to transact business in Idaho Territory, having heretofore duly filed complete maps of their line from Old Mission to Mullan, Idaho, under the general rail right of way act of March the 3rd, 1875, and having complied with the rules and regulations of Hon. Department of the Interior, the said maps were duly approved by the said department and a right of way secured by the said company. Under instructions I am engaged in constructing the said company's line of railroad and shall continue to do so, keeping at all times within the exact limits of our lines and right of way, as shown more definitely by the map so filed with the said Department of the Interior, to which I respectfully refer you.

Yours truly,

W. H. BURRAGE,
Eng'r in Charge of W. & I. R. R. Co.

43 (Copy.)

"EXHIBIT A."

ENG'R'S CAMP, WALLACE, IDAHO, *July* 11, 1887.

To the Oregon Railway and Navigation Co., Mr. Burrage, engineer in charge, and to all persons and railway Co.'s:

You are hereby notified that the Cœur d'Alene Railway and Navigation Co. has filed with the Interior Department, at Washington, a map of and has secured the right of way through the public domain for a railway from Old Mission, Idaho, up the valley of the South fork of the Cœur d'Alene river, to a point about five miles above the town of Mullan, and that they are now engaged in constructing the same continuously and in good faith.

This is to notify you to avoid occupying, in whole or in part, the right of way thus secured to this company and in the construction of a railway through or along the valley of the South fork by the Oregon Railway and Navigation Co. or by any other corporations if it is found necessary to cross the line of this company to do so at the grade established at such point by this company, and at all places to abstain from interfering with the construction and operation of our railway on our location as filed.

THE CŒUR D'ALENE RAILWAY AND NAV. CO.,
By GEO. P. JANES, *Eng'r in Charge.*

44 Endorsed: No. 293. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, defendants. Affidavit of W. H. Burrage on injunction. Filed the 27th day of Oct., 1887. F. E. Lucas, clerk. W. B. Heyburn and Allen, Crowley and Stearns, attorneys for plaintiff.

And afterwards and on October 27th, 1887, affidavit of L. G. Hare was filed, which is in words and figures as follows:

45 In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEO. JAYNES, Defendants.

TERRITORY OF IDAHO, *County of Shoshone,* } *ss:*

L. G. Hare, being duly sworn, says that he acted as axeman in making the survey of all that part of plaintiff's railroad indicated on the map annexed to defendant'- answer and for some distance easterly and westerly thereof; that at the time of the making said survey the line claimed to be defendant's line "C" had not been made nor was there any evidence upon the ground of any survey having been made north of said South fork of the Cœur d'Alene river or on any part of the distance represented by the said line "C."

L. G. HARE.

Subscribed and sworn to before me this 27th day of October, 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

Endorsed: No. 293. In the district court of the first judicial district of Idaho Territory in and for Shoshone county.
46 The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway & N. Co. *et al.*, defendants. Affidavit of L. G. Hare on injunction. Filed the 27th day of October, 1887. F. E. Lucas, clerk. W. B. Heyburn and Allen, Crowley and Stearns, attorneys for plaintiff.

And afterwards and on October 29th, 1887, the testimony herein was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION Company and George P. Janes, Defendants.

Testimony Taken on Application for Temporary Injunction Pending Final Determination of Issue.

W. H. BURRIDGE, one of the plaintiff's affiants, being produced for cross-examination, was cross-examined by ALBERT ALLEN,
47 of counsel for defendants, and testified as follows:

Q. Where do you reside?
A. My home is in Spokane Falls.

Q. You are one of the engineers for the Washington and Idaho Railroad Company?

A. Yes, sir.

Q. I believe that you were the engineer that made their surveys up the South fork of the Cœur d'Alene river last fall?

A. I was assistant engineer.

Q. Who did the actual labor in the field?

A. I was in charge of the labor in the field. Mr. Zahner is chief engineer.

Q. I will ask you whether or not Mr. Zahner was present during all of this survey with you in assisting to make it or whether he simply directed you to make it.

(Objected to by plaintiff's counsel on the ground that question should be confined to the ground in controversy; which objection was by the court overruled; to which ruling plaintiffs then and there excepted.)

A. Most of the time Mr. Zahner directed all the surveys where they were to be made. He was present in the field most of the time.

Q. How many surveys did you make for the route of your road at the town of Wallace?

A. We made two.

Q. Where were those surveys?

A. One on the south side and one on the north side of the river.

48 Q. Which survey did you make first?

A. They were both carried on at the same time. We worked a portion of the day on one and the other on the other. The one on the north side, I believe, was completed first. The one on the south side was run to connect with it.

Q. You ran the one on the south side last, then?

A. We finished it last.

Q. What day did you finish that survey?

A. Over that particular piece of ground right there—I think it was on November 28th.

Q. In surveying this line of road up the South fork, I will ask you whether or not you saw or discovered in your survey a line of stakes of the route of the defendant here up that South fork.

A. I saw them occasionally; yes, sir.

Q. You had your instructions, you say, from Mr. Zahner in making this survey?

A. Yes, sir.

Q. You found those stakes on the ground, did you not?

A. In places.

Q. In places wherever you ran across them?

A. Yes, sir.

Q. Did you pay any attention at all to that line of route as surveyed by the defendant in making your survey or vary your line at all on account of that in any place?

A. No, sir.

Q. In no place?

A. No, sir.

49 Q. You crossed them and recrossed them without any regard to how many times you crossed the other line?

A. We surveyed the best route.

Q. That was your course all the way up the South fork?

A. Yes, sir.

Q. Was that the instructions from Mr. Zahner?

A. I do not remember whether anything was said about it or not.

Q. Well, you were following his instructions in your survey?

A. Yes, sir.

Q. Did he know the fact that you were crossing and recrossing the line of defendant when you made this survey?

A. I do not know whether he knew it or not.

Q. You say he was present with you part of the time?

A. Yes, sir.

Q. I believe this is your affidavit made in this case?

A. Yes, sir.

Q. You say in this affidavit that about the 17th day of August last that you discovered that the defendants were about to abandon their line of road and to get onto your line of road opposite the town of Wallace or at the town of Wallace. I will read it to you: "That about the 17th day of August, 1887, he saw defendants at work in such a manner as to lead him to believe that the defendant was abandoning its survey and passing on the right of way of the plaintiff; that you ammediately went to headquarters to procure maps, data, etc." Now, let me ask you, Did you see the defendant's men at work opposite the town of Wallace or near there at this time you speak of, the 17th of August?

50 A. Yes, sir.

Q. How many of them?

A. I think I saw ten.

Q. Were they on this ground designated on the map filed here that you speak about as designating line "C"?

A. Yes, sir.

Q. You went to see and ascertained the information that that was on your line?

A. Yes, sir.

Q. You served a notice on Mr. Janes, I believe?

A. Yes, sir.

Q. I will ask you if that is a notice you served on Mr. Janes?

A. Yes, sir.

(Said notice is marked for identification "Exhibit A.")

Q. At this time you knew, did you, that your line of road crossed and recrossed the surveyed line of the defendant's road all up and down the South fork in a great many places; that there was a conflict of lines in a great many places?

A. Well, I had seen their stakes.

Q. You knew there was a conflict of lines in a great many places, did you not?

(Objected to by plaintiff's counsel on the ground that the examination should be confined to matter stated in the affidavit of witness.)

Q. You say in this affidavit that you served a notice upon Mr. Janes notifying him to desist from constructing the road of said defendant on the said line aforesaid, which is the line "C," and
51 described on the defendant's map. Now, what notice was that you served?

A. That general notice you have a copy of.

Q. You served no notice applying particularly to this ground?

A. No, sir.

Q. This was all the communication that passed between Mr. Janes and yourself in relation to the matter?

A. Except that first notice.

Q. The first notice was a little correspondence between yourselves, which spoke of lines generally on both sides, was it not?

A. Yes, sir.

Q. In which you stated to Mr. Janes that you were going to follow the line as surveyed by your company, and he proposed to follow the line as surveyed by his company?

A. Yes, sir.

Q. Was that the first notice that you refer to?

A. Yes, sir.

Q. So that was the only notice which you gave in relation to forbidding them to work at that place—this general notice?

A. Yes, sir.

Q. I will ask you whether this might not apply to any part of the road from the mission to——

(Objected to by plaintiff's counsel, and objection sustained.)

Q. Why did you not serve a notice calling the attention of Mr. Janes particularly to this piece of ground where he was get-
52 ting off what you considered his line and getting on to what you considered your company's line at Wallace?

(Objected to by plaintiff's counsel, and objection sustained.)

Q. You knew they were at work there?

A. At that time; yes, sir.

Q. You knew that they were continuing to work there?

A. Well, I left for the outside at that time.

Q. Well, you came back and found them still there?

A. Yes, sir.

Q. And you took no steps to notify them other than this?

A. No, sir.

Q. Where does this line, as you say it is surveyed below the town of Wallace, cross the line of the Cœur d'Alene road and get on to the line "C"?

A. Well, it is about 900 feet below the mouth of Nine Mile creek.

Q. It is right near the point of rocks, is it?

A. Yes; it is represented on that map attached to the answer.

Q. That is substantially correct, is it?

A. Yes, sir.

Q. About what is the angle of the place where your road intersects the Cœur d'Alene line at the lower crossing?

A. Well, I cannot tell that without measuring it. I should judge about thirty degrees.

Q. Is it not a very acute angle?

A. Well, thirty degrees.

53 Q. Are not the roads running pretty nearly parallel with each other just before and after the crossing, and especially after the crossing?

A. One road turns to the right and the other to the left, as shown on that map.

Mr. J. B. ALLEN:

Q. You served this notice that counsel has asked you about where?

A. In the town of Wallace.

Q. Mr. Janes was there in charge, was he?

A. Yes, sir.

In answer to question on page 2:

Q. What day did you finish that survey?

A. It reads November 28th. The answer should be October 28th, for such is the fact, and I intended so to testify.

W. H. BURRAGE.

The plaintiffs having produced the affiants who made the affidavits upon which the restraining order in this cause was issued, as required by law, and said affiants having been submitted for the cross-examination of the defendants' counsel, Charles W. O'Neil was appointed by the court deputy clerk for the purpose of taking such testimony as might be produced, and defendants' counsel announce upon the conclusion of the examination of W. H. Burrage that they did not desire to examine any further the plaintiffs' affiants.

Whereupon the court, having heard the arguments of
54 counsel in the matter, took the matter under advisement until the following morning, when, on the incoming of court on said morning, he requested that the parties—plaintiff and defendant—should produce certain witnesses to be examined by the court with reference to the matters in controversy, to wit, D. C. Corbin, George P. Janes, and P. Zahner, and also ordered that the said deputy clerk, O'Neil, should, as such —, take the testimony of such witnesses.

And thereupon the said Corbin, Janes, and Zahner were severally examined by the court and cross-examined by counsel as follows, to wit:

D. C. CORBIN, one of the defendants' affiants, being examined by the court, testified as follows:

Q. You are the president of the defendant corporation?

A. Yes, sir.

Q. Where does that road commence?
A. It commences at the Old Mission.
Q. To what point is it platted on your maps?
A. To a point five miles beyond Mullan.
Q. What portion of that road is constructed and in operation?
A. It is constructed as far as Wallace and in operation as far as Osborne.
Q. Is any part of it constructed beyond Wallace?
A. Yes, sir; it is graded beyond Wallace up Canyon creek.
Q. In your answer you stated that there was a mistake. Will you state what you meant by that or in what the mistake consisted?

55 A. Well, the mistake consisted in this: When the different surveyed lines were reported to me I directed the route on the north side of the creek at Wallace should be adopted as the route of the road. I always supposed it was adopted; never had any other idea until I had notice of this injunction. It was a perfect surprise to me. I was sure of it. The thought never occurred to me because I directed that that should be the route, and when I ascertained that it was platted in another place it was altogether a surprise to me.

Q. What is the distance from Wallace to the Old Mission?
A. Well, I think it is about 26 miles. I will not be exact about it.

Examined by ALBERT ALLEN:

Q. How much of the road up Canyon creek beyond the point where the injunction covers the ground has the road been graded?

(Objected to by plaintiff's counsel as immaterial and not pertinent to the subject of the inquiry. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. About five miles.
Q. State to the court what you have, if anything, in the way of material for the construction and completion of this road to Burke and where the material is situated with reference to this piece of ground in controversy, below or above it.

(Objected to by plaintiff's counsel as not competent and irrelevant. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

56 —. The large part of the material is laying just at this end of the piece of ground in controversy, at the west end; it is on the lower side of the piece of ground in controversy.
Q. Which side of the ground in controversy does the route lay for your line to Burke?

(Objected to by plaintiff's counsel as incompetent and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. On the eastern side.

Q. What does this material consist of for the construction of this road up Canyon creek—the material below the town of Wallace?

(Objected to by plaintiff's counsel as irrelevant and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. It consisted of rails, ties, and fastenings.

Q. I will ask you whether you have sufficient rails to iron this road to Burke?

(Objected to by plaintiff's counsel as incompetent and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. I have.

Q. How is it with reference to the ties?

(Objected to by the plaintiff's counsel as incompetent and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. I have all the ties excepting about two miles, and they
57 are being cut now.

Q. What is there at the town of Burke, if anything, demanding transportation or to transport as soon as this road may be completed to Burke?

(Objected to by the plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling plaintiff's counsel then and there excepted.)

A. Well, there is quite a large amount of ore there, as I learned from parties who are producing it. Mr. Glidden tells me he will have a large amount of ore to transport.

Mr. HEYBURN: We object to the form of the answer.

By the COURT: Confine yourself to your personal knowledge.

A. As to my personal knowledge, I know there is a large amount of ore to be transported because I have seen it.

Q. What machinery is there to be erected for the working, taking out, and preparing for shipment ores in mines?

(Objected to by plaintiff's counsel. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. Mr. Glidden is erecting a one-hundred-ton concentrator there, which he will have completed in about thirty days; there are other parties on the opposite side, the Poor Man mine, which are getting out a large amount of ore.

Q. What are the means of transporting this ore from Burke in case this railroad is not completed this fall?

58 (Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. Well, I do not think there are any means. I do not know of any, except in a way that will be so expensive as will amount to an embargo on their transportation.

Q. I will ask you if there is any means of transporting anything from Burke to Wallace from the upper end of your present road, where it is now constructed, except over a very rough pack trail.

(Objected to as incompetent, immaterial, and leading. Objection sustained by the court, as the question being leading.)

Q. I will ask you to state what are the means of transporting ores and freight of any kind between Wallace and Burke.

(Objected to by plaintiff's counsel as incompetent and immaterial. Objection overruled by the court; to which ruling plaintiff'- counsel then and there excepted.)

A. No practical means whatever.

Q. Do you know what the means of transporting ores or freights from Burke to Thompson's Falls are?

(Objected to by plaintiff's counsel as incompetent and immaterial. Objection overruled by the court; to which ruling plaintiff's counsel then and there excepted.)

A. Well, it is possible to transport ores there, but the expense is so very heavy that the ores would not stand the transportation.

Q. Do you know anything about the winters in this country?

A. Well, from my experience last winter, I should say they

59 are pretty severe.

Q. How will it be about constructing a railroad up Canyon creek in the winter time?

(Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and as call- for an opinion from the witness.)

By the COURT: Mr. Corbin may state the facts that he knows.

(To which ruling of the court the plaintiff's counsel then and there excepted.)

A. Well, if the winters should be anything like as disagreeable as it was last winter, it would be practicably impossible.

Q. Now, if you should be delayed for, say, thirty days in the getting of this material upon this grade in Canyon creek, in order to lay this track on the grade in Canyon creek, what would be, in your opinion, the probability of being able to complete this road this winter, so as to utilize it in transporting ores and freights from Burke?

(Objected to by plaintiff's counsel as irrelevant and immaterial. Ob-ection overruled by the court; to which ruling of the court the plaintiffs then and ther- excepted.)

A. Well, my opinion about it is that it would be in all probability impossible to do it—practically impossible. It would be so difficult and so expensive that it would take all winter to do it.

Q. I will ask you what grading you have above this ground in controversy, east of the town of Wallace, in connection with your main line of road.

A. I have a Y constructed to turn my engines on to pass
60 upon line up Canyon creek.

Q. Are you acquainted with the proposed line of the plaintiff's road on the South fork of the Cœur d'Alene river from the mission up?

A. I am not, except a very small portion of it.

Q. I will ask you if you know sufficient about it to know how much of it is constructed, if any, in the form of a railroad?

(Objected to by plaintiff's counsel as incompetent and irrelevant. Objection overruled; to which ruling the plaintiff's counsel excepted.)

A. There is none constructed that I know of.

Q. What is the distance from mission to Wallace?

A. About twenty-six miles.

Q. Do you know of any railroad cars or engines or ties or anything for the immediate construction of their road that they have in this country at the present time?

(Objected to by plaintiff's counsel as irrelevant, and the objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. I do not.

Q. Suppose that your line should be constructed to the town of Wallace, on the line of route as indicated by your map as filed in the land office; that the plaintiff's road should be constructed upon its line of route as it was filed, crossing your road there just below Wallace and recrossing it above, what would be the effect of that kind of crossing of one road with the other in the place where they do cross?

61 (Objected to by the plaintiff's counsel as irrelevant and immaterial. Objection sustained by the court.)

Adjourned to 10 a. m., October 29th, 1887.

OCTOBER 29TH, 1887—10 a. m.

Examination of D. C. CORBIN resumed:

Q. I will ask you whether at the time you filed your map in Washington and in the land office you kept a copy of it for your office use.

(Objected to by plaintiff's counsel. Objection overruled; to which ruling plaintiff's counsel excepted.)

A. I did not keep any office map of that part of the line. I proposed making a map of the entire line when it was finished, and

there was a copy in the land office at Cœur d'Alene. Of course I could make a map from the field-notes. I proposed to make a map of the complete line in the fall. I have already spoken to Mr. Janes about it, and told him I wanted a map of the complete line in the office.

Q. On yesterday you spoke about two mines, the Poor Man and the Tiger, ready to ship ore. State whether or not there are no other mines up there ready to ship ores by that railroad.

(Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel excepted.)

A. Well, the Granite mine is ready to ship ore, and there are smaller mines that have small lots of ore that they want to ship, and a good many of them have talked to me about it.

Q. You may state as to whether there are not a large number of mining claims in Nine Mile and Canyon creeks where the
62 parties are waiting for the construction of this railroad for the purpose of developing their lodes.

(Objected to by plaintiff's counsel as leading. Objection sustained.)

Q. You may state whether to your knowledge there are any mines on Nine Mile or Canyon creeks in addition to these which you have mentioned.

(Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. There undoubtedly are a great many other mines.

Q. What are your means of knowledge upon that subject?

A. Well, I have seen quite a good many of them myself and have had some talk with quite a number of men who are owners of that kind of mines. They have been talking to me about shipping ore. I suppose there are other mines, but I have not seen all of them; I have seen a good many.

Cross-examined by Mr. J. A. ALLEN:

Q. You are the person who, as president of your railroad, verified the map of the location along the disputed line which was filed in the office of the Secretary of the Interior?

A. Yes, sir.

Q. You say you did not have any copy of the map of location in the company's office?

63 A. Yes, sir.

Q. But you had it on file in the land office in Cœur d'Alene city?

A. There is a copy on file there.

Q. Did you visit the land office at Cœur d'Alene city from time to time to examine it?

A. No, sir.

Q. You knew, of course, it was there?

A. I knew it was after it came back from the General Land Office.

Q. You were passing back and forth through Cœur d'Alene city, were you not, frequently during the summer and fall?

A. Yes, sir.

Q. You had a large constructing force, did you not, at work at the time the injunction was served on you, did you not?

A. Yes; quite a large force.

Q. You had your constructing engineer on the ground with them?

A. Yes.

Q. It was about the 7th or 8th of September, was it not, or somewhere near that time?

A. I was absent from the country at the time and do not recollect the date now, at the moment.

Q. You went away from the country just before the injunction was served, did you not?

A. I was in the East when I learned of it.

Q. And you say that to the west of this point in dispute you had your material for construction eastward?

A. Yes, sir.

Q. Enough to construct a mile or two or a couple of miles of your road?

64 A. Yes, sir.

Q. The weather has been good since that time, has it not?

A. Most of the time very good.

Q. You had your constructing engineer at work at the time the injunction was served?

A. Yes, sir; Mr. Janes.

Q. He had been on the work, had he not, for some time previous, had he not?

A. Yes, sir.

Q. In fact, had been from the mission up, had he not?

A. No, sir; he has only been with me this year.

Q. For how long a time has he been with you?

A. Since some time last spring. I cannot tell you the date now.

Q. Mr. Janes knew of the map in the Cœur d'Alene land office?

A. I do not know whether he did or not. I cannot say.

Q. By what means did you furnish your constructing engineer information in order to go along your right of way as you had it located in the land office and in the construction of the road?

A. Well, his means of information were the field-notes, I presume, to a very great extent.

Q. He had field-notes, had he?

A. They were accessible to him. I suppose he followed the line indicated by the stakes also.

Q. He also was passing back and forth through Cœur d'Alene city in his business?

A. No; I don't think he was down there until fall.

65 Q. Did you not place in the hands of your constructing engineer some map or profile to show the location of your road as you had taken it from the Government?

A. Well, the location was plainly to be seen by the stakes all the way along, I think, for I followed it part of the way myself.

Q. You knew that the plaintiff had been surveying a road along the South fork, did you not?

A. I did; but I knew he crossed my line regardless of where my line was, and paid very little attention to it. He crossed my line regardless of crossings or anything of the sort.

Q. Is it not a fact that you yourself paid very little attention to your own line, first building it on one side of the creek and then on the other?

A. I do not know that I departed from my line.

Q. Were you present?

A. No, I was not present; but I followed my line very closely, I think.

Q. Do you not know that within a mile or two of this place they are on the opposite side of the Cœur d'Alene river from your survey?

A. I do not understand what you mean by the opposite side.

Q. For instance, your survey is on one side of the stream, and have you not been building on the other side of the stream?

A. Oh, I changed my line in one or two places.

Q. Your road is a narrow gauge, I believe?

A. Yes.

Q. The other road is a standard gauge?

66 A. I never have seen; I do not know what it is.

Q. I notice you speak of it in the pleadings of this case that it would be cheaper for a road of the character of the plaintiff's road to be built on the south side of the river.

A. Well, you asked me if I knew. I do not know. I assume it to be a standard gauge.

Q. Well, that has been the understanding you have had all the while?

A. Yes, sir.

Examined by Mr. CLAGETT, for defendants:

Q. In these matters, where you say you have changed your lines at one or two points, you may say whether you have interfered with the rights or the line of the plaintiff.

A. No, sir; not to my knowledge. One place was at Osborne, where I had to change my line to get a right of way, and possibly one other place.

Q. Any great distance?

A. Oh, no; not for any great distance.

D. C. CORBIN.

GEORGE P. JANES, one of plaintiff's affiants, being examined by Mr. ALLEN, counsel for defendant-, testified as follows:

Q. Did you hear the testimony of Mr. Burrage in relation to serving a notice upon you some time in August last?

A. I did.

Q. I will ask you where you were at work at that time constructing defendant's road.

67 A. In the vicinity of Wallace, the last three miles, probably.

Q. Where were you with reference to the ground in controversy, line C on that map?

A. Westerly, I believe.

Q. You were at that time approaching it?

A. Approaching it. I believe we had done some clearing on it.

Q. You had men, then, at work on it at the time?

A. I believe the contractors had not been on it grading.

Q. Are you familiar with the line of the plaintiff's road as it is marked upon the ground between the mission and the town of Mullen?

A. Not at all points.

Q. I will ask you to state how many times the line of the plaintiff's road is located across the line of the defendant's road and interferes with it.

(Objected to by plaintiff's counsel as incompetent and irrelevant. Objection overruled; to which ruling of the court plaintiff's counsel then and there excepted.)

A. I had noticed their line in several places at least. I am not able to state the number between Wardner Junction and Mullan where the lines intersected.

Q. When this notice was served upon you, why did you not go and examine the map and see whether you were off the platted line of defendant's road at this place in controversy?

(Objected to by plaintiff's counsel as incompetent, and objection sustained.)

Q. I will ask you if your attention was called in any par-

68 ticular to the fact that you had left the platted line of defendant's road by the plaintiff or any of its engineers and had got onto the platted line of plaintiff's road in controversy?

(Objected to by plaintiff's counsel, and objection sustained.)

Q. Did you have any other notice than this written notice that was served upon you?

A. Not any.

Q. Are you acquainted with Burrage, the engineer of the plaintiff?

A. Yes, sir.

Q. Did you have any conversation lately with Burrage with reference to that notice?

(Objected to by plaintiff's counsel, and objection sustained.)

Examined by Mr. J. B. ALLEN, attorney for plaintiff:

Q. You say you saw the stakes of the plaintiff along its surveyed line from the mission eastward?

A. No, sir; I did not say so.

Q. Well you did, did you not, say that one line crossed the other?

A. I said from Wardner Junction eastward.

Q. Between those places you did see the stakes of the plaintiff showing the line that is surveyed, did you not?

A. At places; yes.

Q. And you say you saw where your line, the line of the defendant's company, cross the line of the plaintiff?

69 A. I said where the line of the plaintiff cross the line of the defendant.

Q. Now, at what point did you take charge of the construction of defendant's road?

A. At Wardner Junction.

Q. What information did you have to enable you to place the constructed line upon the surveyed line; what data did you have?

A. The field-notes of the surveyed line and the stakes on the ground.

Q. Did the stakes on the ground of your company's road pass through the town of Wallace on the south side of the river?

A. One line of stakes set by our company did—two lines.

Q. Did you not find the line of stakes of the plaintiff along and adjacent to the road-bed as you were constructing it over this disputed ground?

A. I saw them opposite the mouth of Canyon creek on part of this disputed ground.

Q. You say the first notice served upon you was before any work was done upon the disputed ground?

A. No.

Q. How much, if any, work was done upon the disputed ground when the first notice was served upon you?

A. I believe we had cleared it.

Q. Had you cleared it at that time?

A. I think so; I cannot state positively until I refer to the date of the contract.

Q. And to none of the other work the making grade on

70 the road-bed had been done?

A. I believe not. It might have been on the westerly end.

Q. You are a surveyor of some years' of experience?

A. Yes.

Q. You knew the defendant company had its map of location in the land office at Cœur d'Alene during the summer?

A. No, sir; I did not.

Q. When did you first learn that it had a map of its location in the land office?

A. I do not know the date.

Q. Well, about what time did you first ascertain?

A. About the time of the service of the notice.

Q. Did you have any engineer working with you who informed you that there was a map of location in that land office?

A. No.

Q. Was there not an engineer working with you who had been engaged in making the location of the road?

A. Yes, sir.

Q. You knew this road was on the unsurveyed land of the public land of the United States, did you not?

A. Some of it.

Q. You are acquainted with the fact, are you not, as a surveyor for railroads, that the maps have to be filed in the land office designating the route?

(Objected to as incompetent, and objection sustained.)

71 Q. Do you not know it is the practice of railroads locating lines over the public domain to file their plats of the route in the land office?

(Objected to as incompetent, and objection overruled.)

A. No, sir; I do not.

Q. Did you not prepare maps for that purpose as an engineer of a railroad?

A. I have on surveyed land.

Q. You never did on unsurveyed land?

A. I have not.

Q. I will ask you to state if, after you received the first notice directing you to the map of the location of the line of road of the plaintiff in the land office, you made any other inquiry to ascertain its location or to ascertain in regard to its maps of location?

A. I did.

Q. You found they had a map, did you not, along this disputed ground?

A. Yes, sir.

Q. When was it you ascertained that?

A. When the injunction was served.

Q. And until the injunction was served, you did not follow up either of the notices that were given you to inquire at the land office?

A. I had not.

72 Q. You at once discovered, in going to the land office when the injunction was served, that you were building on the location of the plaintiff, did you not?

(Objected to as assuming that it was the location of the plaintiff.)

Q. You readily discovered that you were building upon the line of the plaintiff, as indicated upon the map of location in the land office, did you not?

A. I discovered that we were upon the same side of the river.

Q. Did you have a large constructing force under your charge at that time?

A. Yes; a constructing force; not a large one.

Q. What length of time would it have taken that constructing force to have built a mile and a half of road along there at Wallace?

A. About two months, probably.

Q. Could you not have put on a constructing force and built such a road within a month?

A. It is possible.

Q. Now, did you not say to Mr. Stearns about the time of the injunction that if you had known that the notice applied to this particular piece of road that you would have hurried up and completed it so quickly that the injunction could not have been served upon you?

A. It is possible that during quite a conversation I might have made some such remark.

73 (Defendant's counsel move that the last question and answer be stricken out. Motion overruled by the court; to which defendant's counsel then and there excepted.)

Q. Did you not also clear your right of way above and below this disputed ground before you went on to it?

A. I did not, as I remember the work was continuous.

Q. Did you not work on the road-bed of the road westerly and easterly of this disputed portion before going upon it? Did you do work of that kind?

A. No; I began on the west end.

Q. Had you not gone beyond it and done construction work easterly also?

A. Not before we began on the west end.

Q. You did very little work on the west end before you had gone east of it? In other words, did you not leave this space while you were doing construction work on the road-bed both east and west of it?

A. The contract covering part of this was let to men who were at that time working west of it and had not gotten ready to move their forces up.

Q. Did you have that notice served upon Mr. Burrage, the engineer of the plaintiff?

A. As near as I can tell, it is a copy of the notice I served.

Q. Have you the original?

A. I have a copy of it.

Q. You recognize that as a copy of it, do you not?

A. Yes; as near as I remember.

Q. What map were you referring to when you stated in
74 this notice to Mr. Burrage, "You are hereby notified that the Cœur d'Alene Railroad and Navigation Company has filed with the Interior Department at Washington a map of and has graded a right of way through the public domain for a railway from the Old Mission, Idaho, up the valley of the South fork of the Cœur d'Alene river to a point about five miles from the town of Mullan"?

A. I was referring to a map filed by the Cœur d'Alene Railway

and Navigation Company with the Interior Department at Washington.

Q. So that on the 11th of July, 1886, you were aware that they had such a map?

A. Had such a map filed in Washington.

Q. And yet you proceed with the construction of this road without having the map or a copy of it with you or at hand for reference?

A. Yes, sir; I had what I considered copy of the map, in effect; the notes and stakes, the data from which it was made.

Q. Have you those notes with you?

A. I have not.

Re-examined by Mr. ALBERT ALLEN for the defendant:

Q. You have testified that when you were constructing the line over the ground in controversy that at one or two places at the mouth of Canyon creek you noticed some of the stakes of the plaintiff's road?

A. I did.

Q. I ask you what, if anything, you found on the same line or near there on the line you constructed indicating the line of the defendant's road?

A. I found a continuous line of the defendant's stakes.

75 Q. What is the general practice of railroad constructing engineers, in the construction of a road, as to using the field-note- for their guidance or map, which are somewhere at a distance?

(Objected to by plaintiff's counsel as incompetent. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. It is customary to use notes of the original survey in contradistinction from copy of the map.

Q. How many places were there on the line of your road where the plaintiff's road crossed the defendant's road similar to the place in controversy?

A. At several points; two or three. I don't know how many points.

Q. I will ask you to state with reference to this matter of the construction of this part whether it was constructed in any different manner, with greater or less haste, than any other part of the road?

(Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling the plaintiff's counsel then and there excepted.)

A. It was not.

Q. I believe you stated that a part of this work was let to contractors who for a time were engaged in constructing the road west of the ground in controversy?

A. Yes, sir.

Q. When did they commence the work of construction on the

ground in controversy with reference to when they finished the work on the other part?

A. Immediately after they finished their westerly contracts.

76 Q. Something is said in the complaint in this case about the defendant or you, as their engineer, concentrating a large portion of its forces on this particular ground and building it in haste. What is there to that?

(Objected to by plaintiff's counsel on the ground that the allegation is not denied in the answer. Objection overruled by the court; to which ruling plaintiff's counsel then and there excepted.)

A. There was no particular concentration, except that, that being the end of the present construction, the forces were necessarily taken off the completed portion and moved up towards the uncompleted portion.

Q. Were they taken from the uncompleted portion until the work was there completed?

(Objected to by plaintiff's counsel as incompetent. Objection overruled by the court; to which ruling plaintiff's counsel then and there excepted.)

A. I say they were taken from the completed work and moved to the incompleted.

Q. How much road has the plaintiff constructed on its line?

(Objected to by the plaintiff's counsel as immaterial. Objection overruled by the court, and plaintiff's counsel then and there excepted.)

A. They have done work at some points above Wallace. I do not know how much.

77 Q. What have they in the way of a constructed line or a grading for a line from Wallace to the Indian reservation near the mission?

(Objected to by plaintiff's counsel as immaterial. Objection overruled, and plaintiff's counsel then and there excepted.)

A. Nothing.

Q. Do you know what they may have done down near Kingston?

A. No, sir; I do not know of any work of my personal knowledge.

Q. You state that you never have made any maps to be filed in the land office for a right of way of the railroad, excepting on surveyed land. Let me ask you whether you have not made a map of a line running up Canyon creek to be filed in the land office.

A. Yes, sir; I did.

Q. When you testified in reference to not having made maps, did you think of that?

A. I did not think of it. I referred to my work previous to this case—to my past experience.

GEO. P. JANES.

78 P. ZAHNER, examined by the court, testified as follows:

Q. You are the chief engineer of the plaintiffs?
A. Yes, sir.
Q. Where is the starting point of their line at Farmington? Where is the objective point as platted?
A. The objective point as first made known to me was Mullan.
Q. What is the distance between the two?
A. About one hundred miles.
Q. Is any part of the road under construction now?
A. Yes, sir.
Q. Where is it?
A. In the neighborhood of Kingston and below.
Q. What amount of road?
A. Very nearly three miles of clearing has been done on it.
Q. I believe it has been testified that Kingston is about twenty-six miles from this land in dispute, or is it the Old Mission?
A. It is the Old Mission. It is a little less Kingston—twenty-three, perhaps.

Examined by Mr. CLAGETT:

Q. How much of this track do you say has been cleared?
A. There is nearly three miles.
Q. Whereabouts?
A. It lays between Small's mill and Kingston?
Q. During what time has that work been done—prior or since the beginning of this suit?
A. Since.
Q. How recently?

79 (Objected to by plaintiff's counsel as immaterial. Objection overruled; to which ruling plaintiff's counsel then and there excepted.)

A. Something over a month.
Q. Is it still progressing?
A. Yes, sir.
Q. What force of men have you employed?
A. It is let by contract, and I do not know the number of men that are at work on it.
Q. What length of track have you let?
A. Three miles.
Q. What other contracts between Kingston and Wallace have you made?
A. None positively. They are under consideration, but I expect will be.
Q. Are you the chief engineer of the plaintiffs in this action?
A. Yes, sir.
Q. Are you advised with regard to the plats and preparation of your company—as to their immediate use of this road?
A. Partially.

Q. Are you advised as to what your company intends to do this fall and winter between Kingston and Wallace?

A. Partially. I do not know that I am wholly advised as to what the intentions are.

Q. What time has been set for the completion of the grading of this three miles?

(Objected to by plaintiff's counsel as attempting to make the witness disclose the private intentions of the plaintiff corporation. Objection sustained on the ground that the question seeks to
80 make the witness disclose what he may have learned from his confidential relations with his employer.)

Q. You may state as to whether the plaintiff in this action, speaking as a constructing engineer familiar with the difficulties of building the road at this season of the year and in the winter—whether this railroad which is proposed to be built by the plaintiffs can be built so as to be utilized as a railroad prior to next spring.

(Objected to by plaintiffs as irrelevant. Objection overruled; to which ruling the plaintiff's counsel excepted.)

A. If I am called to answer the question, I would answer, Yes; it can be.

Q. Have any preparations been made, to your knowledge, by the plaintiff in this action to so build it?

(Objected to by plaintiff's counsel as inquiring into the private intentions of the company.)

By the COURT: You may answer the question whether there have been any arrangements made.

A. I would like to be excused from answering these questions. They cause me to disclose matter that I am not at liberty to tell only under the power of the law, and it imperils my standing with the company.

By the COURT: Well, all you need answer is whether there are any visible preparations on the grounds that the public could know as well as you—whether there is anybody at work or any material on the ground; that is all; something that anybody can see that passes along.

81 A. There is nothing there in the sight of the public in the way of material along this portion of the line.

P. ZAHNER.

I, the undersigned, judge of the foregoing-entitled court, do hereby certify that the examination of each of the foregoing witnesses, to wit, W. H. Burrage, D. C. Corbin, George P. Janes, and P. Zahner, was pursuant to the request of said defendant at the time of making the same respectively, and was submitted by said affiants respectively, and that said testimony so subscribed is the examination and all the examination of said witnesses taken in compliance with the order of the court, and is hereby, as of October 29th, 1887, and before the entry of the order refusing to grant the injunction in said

cause, made a part of the record therein in the same manner as affidavits, and made a part of such record.

NORMAN BUCK, *Judge.*

Endorsed: Evidence. Filed Oct. 29th, 1887. F. E. Lucas, clerk.

And afterwards and on June 22nd, 1888, the following journal entry was made and entered herein, which is in words and figures as follows, to wit:

82 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County, June Term, A. D. 1888, 8th Judicial Day.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*, Defendant-.

FRIDAY, *June* 22, 1888.

At this day appeared the plaintiff, by its attorneys, Messrs Woods and Heyburn, and defendants, by Messrs. Allen and Clagett, their counsel, came also, and this cause came on for trial before the court, sitting without a jury, and by stipulation in open court it is agreed that all the evidence and exhibits on the original hearing on application to dissolve the temporary injunction shall be allowed in evidence in the trial of this cause, with leave to either party to introduce maps or other documentary evidence upon the hearing, subject only to objection as to its competency.

Now, at this time, the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on January 5th, A. D. 1889, findings of fact and conclusions of law were filed, which are in words and figures as follows, to wit:

83 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County, June Term, A. D. 1888.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendants.

This case having been regularly called for trial before the court, a a jury trial having been waived by oral consent of the parties in open court, Messrs. Woods and Heyburn appearing as attorneys for the plaintiff and William H. Clagett and Albert Allen appearing as attorneys for the defendants, and the court having heard the proofs of the respective parties and considered the same and the records and papers in the cause and the arguments of the respective attor-

neys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

1.

That the plaintiff now is and ever since the 5th day of July, 1886, has been a corporation duly organized and existing under the laws of the Territory of Washington, for the purpose, among others, of constructing, equipping, operating, and maintaining a railroad and telegraph line from the town of Farmington, in Washington
84 Territory, by the most practical route in a general northerly direction to a point at or near the town of Spokane Falls, in said Territory, and from a junction with said line near the forks of Hangman creek, in said Washington Territory, in a general northeasterly direction across the Cœur d'Alene Indian reservation to a point near the mouth of the St. Joseph river, on Cœur d'Alene lake; thence in a northerly direction along the east side of the Cœur d'Alene lake to the Cœur d'Alene river; thence in a general easterly direction to the Cœur d'Alene mission; thence in a southeasterly direction by the valley of the South fork of the Cœur d'Alene river via the town of Milo, in Idaho Territory, and continuing from the said town of Milo, in Shoshone county, Idaho Territory, following the South fork of the Cour d'Alene river about twenty (20) miles to the town of Mullan, in said Territory of Idaho, and also a like railroad and telegraph line from said Mullan, in Idaho Territory, in an easterly direction, by the most practical route, across the Bitter Root mountains to Missoula, in the Territory of Montana, a distance of about one hundred (100) miles.

"I so find.

J. L. L."

2.

That on the 28th day of June, 1887, the plaintiff, in compliance with the laws of Idaho Territory, duly designated and appointed a person residing in Nez Perce county, in said Territory of Idaho, the county in which the principal place of business of the plaintiff in said Idaho Territory is conducted, upon whom process issued by authority of or under any law of said Idaho Territory may
85 be served, and on, to wit, the 8th day of July, 1887, duly caused said designation and appointment to be filed in the office of the secretary of said Idaho Territory, and on, to wit, the — day of ——, caused the same to be filed in the office of the clerk of the court for said county of Nez Perce, and has in all respects complied with the law of said Idaho Territory respecting foreign corporations transacting business therein.

"I so find.

J. L. L."

3.

That in pursuance of the said objects of its incorporation, for the purpose of obtaining a right of way over the public domain of the United States wherever its said railroad should traverse the same,

the plaintiff, on the 23d day of December, 1886, duly filed with the Secretary of the Interior, at Washington, in the District of Columbia, a copy of its articles of incorporation and due proofs of its organization under the same, together with a duly certified copy of the law of said Territory of Washington under which said corporation was organized, and in all respects duly complied with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," and the rules and regulations of the Hon. Secretary of the Interior thereunder.

"I so find.

J. L. L."

4.

That the defendant The Cœur d'Alene Railway and Navigation Company is now and ever since the 6th day of July, 1886, has been a corporation duly organized and existing under the laws of
86 the Territory of Montana, for the purpose of constructing and operating a railroad from a point known as Old Mission, in Kootenai county, Idaho Territory, and thence running up the valleys of the Cœur d'Alene river and the South fork of the Cœur d'Alene river, and thence by the most practical route to the town of Thompson Falls, in the Territory of Montana.

"I so find.

J. L. L."

5.

That on the 20th day of July, 1886, for the purpose of securing the right of way over the public lands for such railroad, the said defendant duly filed with the Secretary of the Interior, at Washington, D. C., a copy of its articles of incorporation and due proofs of its organization under the same, and in all respects complied with the act of Congress approved March 3d, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

"I so find.

J. L. L."

6.

That for the purpose of securing to it the right of way through the public lands granted by said act of Congress the said defendant caused the central line of route of its said railroad to be surveyed from said Old Mission, in said Kootenai county, to a point about five miles easterly from the town of Mullan, in the county of Shoshone, in said Idaho Territory, a total distance of thirty-five (35) miles and six hundred and sixty-one (661) feet, the said line of route as so surveyed commencing at said Old Mission and running thence in an easterly direction up the valley of the
87 Cœur d'Alene river to the town of Kingston, in said Shoshone county, and thence in an easterly direction up the valley of the South fork of the Cœur d'Alene river via the town- of Wardner

Junction, Wallace, and Mullan, and to a point about five miles east of the said town of Mullan, and that the central line of route of said railroad as so surveyed was by the engineers of the defendant at the time of making such survey marked upon the ground by stakes set in the ground at the end of each one hundred feet of said line, which stakes were numbered respectively, commencing at said Old Mission, and that such survey and marking said central line was done in the manner usual and customary in surveying and locating the line of railroads, and that in making the said survey and locating the line of route of the said defendant's said railroad for the purpose of obtaining the cheapest and most practical route at and near the town of Wallace surveyed and marked upon the ground three different lines, all of which, together with plaintiff's line of route, will appear upon the map hereto attached, marked Exhibit "A," and hereby made a part of these findings, two of said lines, marked upon said map as lines A and B, departing from the present constructed line of defendant's road just below the town of Wallace and running thence across the South fork of the Cœur d'Alene river and through the town of Wallace, and thence in an easterly direction, recrossing said South fork and connecting with the line of defendant's road as now constructed near the mouth of Canyon creek, and the third line running on the north bank of said South fork, and being the line upon which the said defendant's railroad is constructed, and which is the ground, premises,
88 and right of way in controversy in this action and the line described as line "C" on said map, and that the survey by defendant's engineers of the section of defendant's railroad between the town of Wallace and the town of Mullan, including the line over the premises in controversy, was commenced on the 22nd day of October, 1886, and completed on the 5th day of November, 1886.

"I so find.

J. L. L."

7.

That on the 8th day of November, 1886, the said defendant filed with the register of the United States land office at Cœur d'Alene, Idaho, that being the district in which said line of route is situated, a map or profile of that portion of said central line of route from Wardner Junction to the town of Wallace, as so surveyed, and that on the 9th day of November, 1886, the defendant filed with said register of said land office a map or profile of that portion of said central line of route as so surveyed from said town of Wallace to said point about five miles above the town of Mullan, and that each of said maps or profiles were duly verified and certified in accordance with rule IV of the rules and regulations of the Department of the Interior relative to rights of way for railroads under said act of Congress, and which maps were approved by the Secretary of the Interior on the 3rd day of December, 1886.

"I so find.

J. L. L."

8.

That the defendant intended to and did adopt the said line C as the definite line of route for its said railroad at and near said
89 town of Wallace, but that by a mistake of the engineer of said defendant in making said maps or profiles so to be filed in said land office the said line B was platted thereon, and that said mistake was not discovered by the defendant or its engineers until the service of the summons and complaint and injunction in this action.

"I so find.

J. L. L."

9.

That for the purpose of obtaining a right of way as granted by said act of Congress the plaintiff caused the central line of its railroad to be surveyed from said town of Farmington to said point near the forks of Hangman creek, and thence along the course of its railroad, as described in the complaint and as hereinbefore mentioned, to said town of Mullan, and that at the time of making such survey the said central line of the plaintiff's said railroad as so surveyed was marked upon the ground by stakes set at the end of each one hundred (100) feet, called stations, of said line, commencing at said Farmington, and in places by stakes called plus stakes between such stations, said stakes being properly numbered and marked, said marking of said line being in all respects done in the manner usual and customary in surveying and marking the line of route of railroads; and that the survey of the first section of plaintiff's said line, beginning at said Farmington and extending to said forks of Hangman creek, was begun August 30th, 1886, and completed September 11th, 1886, and the survey of the second section of said route from said forks of Hangman creek to the western boundary line of the Cœur d'Alene Indian reservation was begun September 13th, 1886, and completed September 16th, 1886, and that the survey of
90 that section or portion of said route beginning near the Old Mission and extending along the Cœur d'Alene river and the South fork of the Cœur d'Alene river to a point at or near Osborn, a distance of twenty (20), miles was begun September 25th, 1886, and completed October 22nd, 1886, and that the survey of that section of said route beginning at or near said Osborn and extending thence to said Mullan, being the section within which the ground in controversy is situated, was begun October 22nd, 1886, and completed November 8th, 1886, and that that portion of plaintiff's said line of route at and near said town of Wallace, as so surveyed and marked upon the ground, runs along the north bank of North fork of the Cœur d'Alene river, substantially upon the same line as line C of defendant's survey upon which defendant has constructed its road; which line of plaintiff's survey at and near said town of Wallace is marked "W. & I. line" and shown upon said map attached to these findings.

"I so find.

J. L. L."

10.

That after each of said sections of survey of the plaintiff's line of route was made the plaintiff caused correct maps or profiles of the respective sections thereof as so surveyed to be made for the purpose of filing the same in the office of the Secretary of the Interior, which maps were each respectively duly verified and certified by the affidavits of the chief engineer and the president of the plaintiff, as required by rule IV of the rules and regulations of the Department of the Interior relative to rights of way for railroads
91 under said act of March 3d, 1875, and that the line of route so surveyed and so represented by said maps respectively was adopted by said plaintiff by resolutions of its board of directors of dates respectively December 2nd, 1886, and December 24th, 1886, as the definite location of the line of route of plaintiff's said railroad, and that said map of said section of plaintiff's line of road from Old Mission to a point near Osborne and the said map of said section of plaintiff's road from a point near Osborne to the town of Mullan were filed in the office of the register of the land office at Cœur d'Alene city, Idaho, that being the district in which the premises were situated, and that said maps of said portion of plaintiff's said line from Old Mission to a point near Osborne was approved by the Hon. Secretary of the Interior on the 5th day of March, 1887, and the said map of said section from a point near Osborne to the town of Mullan was approved by said Secretary on February 7th, 1887.

"I so find.

J. L. L."

11.

That all of the lands over which the line of route of both plaintiff's and said defendant's railroads pass between the said Old Mission and the said town of Mullan were and are public lands of the United States, and that the said public lands are unsurveyed, excepting a few sections near the said Old Mission, and that the premises in controversy in this action are unsurveyed public lands.

"I so find.

J. L. L."

92 12.

That the line of route of the plaintiff's road was not surveyed in any place until after the survey of the line of route of the said defendant's road over the same section, excepting as to that portion of the line designated on the map hereto attached as line "C," and that as to said portions designated by line "C" the plaintiff's line was surveyed a few days prior to the survey of said line "C" by the defendant, and that in surveying the plaintiff's line from said Old Mission to said Mullan the plaintiff's engineers frequently saw the line of defendant's road as surveyed and marked upon the ground and knew that defendant was engaged in the construction of its railroad thereon; but that said engineers for the plaintiff in

making said survey of plaintiff's road paid no attention to said line of defendant's road as surveyed and marked upon the ground, but so surveyed the line of plaintiff's road as to cross and recross defendant's line of road in numerous places between said Old Mission and said town of Mullan, and that in surveying the said portion of plaintiff's line near said town of Wallace designated as line "C" on the map hereto attached the said engineers so surveyed the plaintiff's line as to cross the defendant's line at a very acute angle and to recross the same at the upper end of said line "C," and that even if the defendant's road was constructed upon line "B" at said town of Wallace, as it is contended by the plaintiff it should have been, the plaintiff could not occupy or use the premises of said line "C"
93 without making two unnecessary crossings of the defendant's railroad, and that such crossings would be expensive to maintain and dangerous in the operation of both roads; that there is an abundance of room for the construction of the plaintiff's road at and near the said town of Wallace upon a practical line without crossing or interfering with the defendant's road as now constructed or with said line "B."

I so find.

J. L. L.

13.

That during the summer and fall of 1886 the said defendant fully constructed its railroad from said Old Mission to Wardner Junction over its said line of route, and that during the summer and the fall of 1887 the defendant fully constructed its said railroad over its line of route as so surveyed from Wardner Junction to said town of Wallace, and at the time of the commencement of this action was operating the same with engines and cars in the transportation of freight and passengers, and had completely graded its line of road over and along said line "C," and had laid the ties and rails upon about one-half of said line "C," and had partly constructed a depot and warehouse thereon, and had also graded a Y at the upper end of said line "C" at the mouth of Canyon creek, and had also caused to be graded a branch line of said railroad from said Y at the mouth of Canyon creek to the town of Burke, and had the material therefor and was ready to lay the ties and rails thereon for the purpose of operating the same as a railway, and that all of said work done by the defendant in the construction of said railroad was done in good faith, and
94 at the time of grading the defendant's railroad and laying of the ties and rails thereon and doing all of the work which it did thereon up to the time of the commencement of this suit, there were no stakes or anything upon the ground to indicate that the plaintiff's line of road had been surveyed over said line "C," and the defendant did not, nor did any of the officers or engineers of the defendant know, that the plaintiff's line had ever been surveyed over said line "C," neither was the defendant nor any of its officers or engineers aware of the fact that the engineer of the defendant had made a mistake and platted line "B" instead of line "C" upon

its map thereof filed in the land office, but believed and supposed that said line "C" had been platted upon said map; that during the time of the doing of the work of grading and laying ties and rails by the defendant upon the said line "C" and the construction of its depot and warehouse thereon the engineers and attorneys of the plaintiff who had the business of the plaintiff in this county in charge frequently saw the work of construction of said road and depot and warehouse by the defendant going on and well knew that the defendant was constructing the same over the line that the plaintiff had surveyed, and well knowing that the work of grading being done by the defendant could be utilized to great advantage by the plaintiff if it could afterwards succeed in obtaining possession thereof, yet notwithstanding these facts the plaintiff did not nor did any of its engineers or officers or attorneys make any objection to the occupancy of said line "C" by the defendant or to its constructing its railroad thereon until the service of the in-
95 junction in this action, and that the service of the injunction in this action was the first intimation that the defendant had that the plaintiff claimed any right whatever to a right of way over said line "C."

I so find.

J. L. L.

14.

That the said survey of the line of road by the plaintiff over the ground in controversy in this action was made prior to the time when the plaintiff filed its articles of incorporation and proofs of its organization with the Secretary of the Interior at Washington, and that the plaintiff has not at any time since the making of said survey made any new survey over said ground in controversy or done any act in locating a line of route of or for or toward the construction of a railroad over the same or any part thereof, and that the plaintiff has never entered upon or done any work upon or expended any money upon said premises in controversy in this action other than the making of said survey, which was done prior to the date upon which its articles of incorporation and proofs of its organization with the Secretary of the Interior were filed as aforesaid.

I so find.

J. L. L.

96 The court finds the following conclusions of law, namely:

1st. That the survey of the plaintiff over the land in controversy having been made prior to the time of filing in the office of the Secretary of Interior of its articles of incorporation and proofs of the organization of the plaintiff company, that by the said survey, at the time it was made and at the time of the commencement of this action, plaintiff obtained and had no exclusive right, title, or interest in said premises by said survey for a right of way or otherwise.

I so find.

J. L. L.

2nd. That by reason of the filing by the defendant in the office of the Secretary of the Interior of a copy of its articles of incorporation and due proofs of its organization, as set forth in the findings herein, and by reason of its survey and construction of its railroad over the lands in controversy the defendant has acquired a right of way superior to plaintiff's over the same and is entitled to the use and enjoyment of its line of road as constructed over said lands in controversy, and that the plaintiff, by reason of the acts of its engineers, officers, and attorneys in standing by and permitting the defendant to construct its railroad over the premises in controversy without making known to the defendant the claim of the plaintiff thereto and without making any objections to said work by the defendant, is estopped from now claiming a right of way over the said premises now in controversy.

I so find.

J. L. L.

97 3rd. That rule IV of the circular issued by the Department of the Interior November 7th, 1879, relative to rights of way for railroads over the unsurveyed public lands is not required or authorized by the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through public lands of the United States," but it is wholly without authority and of no binding force or effect.

Refused.

J. L. L.

That the various maps or profiles of the lines of route of the railroads of both plaintiff and defendant filed with the Secretary of the Interior in pursuance of said rule IV, as well as the approval of the Secretary of the Interior thereof, were wholly unauthorized and of no binding force or effect upon either party.

Refused.

J. L. L.

4th. That the plaintiff is not entitled to take anything by this action, and that defendant, The Cœur d'Alene Railway and Navigation Company, is entitled to the decree of this court quieting the title in it to the strip of ground on line of its railroad as constructed through and over the land in controversy in this action and against the plaintiff and all persons or corporations claiming under the plaintiff, and for its costs in this action, and it is so ordered.

JOHN L. LOGAN, *Judge.*

98 (Endorsed:) No. 293. In the district court, first judicial district of Idaho Territory in and for Shoshone county. The Washington and Idaho Railroad Company *vs.* The Cœur d'Alene Railway and Navigation Company *et al.* Findings of fact and conclusions of law. Filed January 5th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on January 5th, 1889, facts submitted by plaintiff herein *was* filed, which are in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant.

The plaintiff asks the court to find the following facts:

99 1.

Was the plaintiff a corporation duly organized and existing under the laws of Washington Territory since the 5th day of July, 1886?

2.

Had the plaintiff complied in all respects with the laws of Idaho Territory in respect to foreign corporations doing business in said Territory?

3.

Did the plaintiff, on the 23rd day of December, 1886, duly file with the Secretary of the Interior at Washington, D. C., a copy of its articles of incorporation and due proofs of its organization under the same, together with a duly certified copy of the laws of said Washington Territory under which said corporation was organized, and in all respects comply with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," and the rules and regulations of the Secretary of the Interior made thereunder?

4.

Did the plaintiff locate, survey, and mark upon the ground, at the time and in the manner as in the fourth paragraph of its complaint alleged, the line of its railroad?

5.

Did the plaintiff, after such surveys were made and at the dates and in the manner in the said complaint alleged, make, cer-
100 tify, and file maps and profiles of its line of railroad, as so surveyed, located, and marked on the ground, with the Secretary of the Interior of the United States for his approval, in manner and form as in said act of Congress of March 3rd, 1875, and the said rules and regulations of the said Secretary of the Interior prescribed and provided to be done?

6.

Did plaintiff by resolution of its board of directors adopt as the line of its railroad the line so surveyed, located, and marked on the ground, platted, filed, and approved by the Secretary of the Interior of the United States, as in said complaint alleged?

7.

Did the Secretary of the Interior of the United States approve the maps of the plaintiff as so filed?

8.

When did the Secretary of the Interior approve of the line of plaintiff's railroad over the ground in controversy in this suit?

9.

Were the lands in controversy, over which the line of plaintiff's railroad was located, public lands of the United States remaining unsurveyed?

10.

Was the defendant at the time of the commencement of this suit a corporation duly organized and existing under any law; and, if so, what?

101 11.

Had the defendant complied in all respects with the laws of Idaho Territory respecting foreign corporations doing business in said Territory?

12.

Did the defendant at any time prior to the commencement of this action file with the Secretary of the Interior, at Washington, D. C., a copy of its articles of incorporation and due proofs of its organization and in all or in any respects comply with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," and the rules and regulations of the Secretary of the Interior of the United States made thereunder?

12.

Did the defendant locate, survey, and mark upon the ground at any time prior to the commencement of this suit the line of its railroad?

13.

Did the defendant ever make, certify, and file a map or profile of its line of railroad, as the same was surveyed, located, and marked upon the ground, with the Secretary of the Interior of — United States for his approval in manner and form as in said act of Congress and the said rules and regulations of the Secretary of the Interior prescribed and provided to be done; and, if the defendant

did make and file such a map or profile, was it over or
102 within one hundred feet of the ground in controversy in this action?

14.

Has defendant ever made or filed any amended survey or map of its location so as to include the ground in controversy?

15.

Did the defendant at any time, by resolutions of its board of directors, adopt as the line of its railroad the line indicated upon its map filed with the Secretary of the Interior?

16.

Did the Secretary of the Interior of the United States approve any map or profile of the defendant's railroad — by them for his approval?

17.

When did the Secretary of the Interior approve of the line of defendant's railroad as shown by its maps or profiles filed with him for that purpose?

18.

Has the defendant ever filed any map or profile of the line of railroad over or within one hundred feet of the line "C" on the map attached to defendant's answer in this case?

19.

Had defendant on the 23rd day of August, 1887, done any grading for a railroad upon line "C"?

103 20.

What work, if any, had defendant performed toward the construction of a railroad on line "C" on the 23rd day of August, 1887?

21.

Did the defendant have notice of the filing and approval of the map and profiles of plaintiff's road by the Secretary of the Interior of the United States on August 23rd, 1887?

22.

What length of time was required by the ordinary modes of travel, in August and September, 1887, to go from Wallace, in Shoshone county, Idaho Territory, to Farmington, in Whitman county, Washington Territory?

23.

What length of time was required to go by the ordinary method of travel in August and September, 1887, from Farmington, Washington Territory, to Mt. Idaho, in Idaho county, Idaho Territory?

24.

What length of time was required by the ordinary modes of travel in August and September, 1887, to go from Mt. Idaho, in Idaho county, Idaho Territory, to Murray, in Shoshone county, Idaho Territory?

25.

What length of time, by the ordinary modes of travel in
104 August and September, 1887, was required to go from Murray to Wallace, in said county?

26.

Where does the town of Wallace lie with reference to the two points of crossing mentioned in defendant's answer?

27.

At what angle does the plaintiff's road propose to cross defendant's road on the western side of the town of Wallace, and at what angle does it propose to cross on the easterly side of said town?

28.

Did defendant construct or start to construct its road upon line "C" by reason of the mistake as to the location of their road as indicated by their map filed; if so, when was the mistake first discovered by it?

30.

Could the defendant have constructed its road over its line as filed upon between the 13th of September, 1887, and the 29th of October, 1887?

31.

Did defendant continue to construct its road upon line "C" after it was advised that such line belonged to plaintiff and was not the line upon which it had filed its map?

105 That no proceedings have been commenced by or on behalf of defendant to procure the right of way on line "C."

That testimony taken and reduced to writing at former hearing and heretofore attached and marked "Exhibit A" of the findings and all the affidavits and maps used on the application for an injunction heretofore made and hereto attached and marked Exhibits "B," "C," "D," "E," etc., were, by stipulation of counsel made in open court, admitted to be and constitute the testimony offered on the part of plaintiff and defendant in the trial of this cause and to constitute the record of the evidence offered by parties plaintiff and defendant on the trial hereof.

(Endorsed:) No. 293. In district court, Shoshone county. The Washington and Idaho R. R. Co. *vs.* The Cœur d'Alene R. & N. Co. Facts submitted by plaintiff to be found by the court. Refused to

find on the ground of form and because already sufficiently found. John L. Logan, judge. Filed January 5th, A. D. 1889. J. H. Grierson, clerk, by Barry W. Hillard, deputy. Woods and Heyburn, pl'ff's att'ys.

106 And afterwards and on January 5th, 1889, judgment herein was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and GEORGE P. JANES, Defendant-.

This action having come on for trial at the June, 1888, term of the above court, in its regular order upon the calendar, Messrs. Heyburn and Woods appearing as attorneys for the plaintiff and William H. Clagget & Albert Allen appearing as attorneys for the defendant The Cœur d'Alene Railway and Navigation Company, and a jury trial having been expressly waived in open court, and the cause having been tried by the court without a jury, and the court, after hearing and considering the evidence adduced by both parties and the argument of counsel for both parties, took the said cause under advisement, by consent and without objection, until the December, 1888, term of said court, and the court, at the said December, 1888, term of said court, to wit, on the 5th day of January, A. D. 1889, having duly made and filed its findings of fact and conclusions of law herein, and it appearing from said findings
107 of fact and conclusions of law that the defendant The Cœur d'Alene Railway and Navigation Company is entitled to the decree hereinafter specified:

It is therefore ordered, adjudged, and decreed by the court that the defendant The Cœur d'Alene Railway and Navigation Company is the owner and entitled to the exclusive possession, occupancy, and use of the lands and premises upon which its line of railroad is now constructed, and to the embankments, cuts, and excavations constituting the road-bed of said railroad in and across the land in controversy, herein designated upon the map attached to and made a part of the findings herein (Exhibit A) as "line C," and that plaintiffs, The Washington and Idaho Railroad Company, has no right, title, or interest in said land or any part thereof for the purpose of a right of way for its proposed railroad or for any purpose whatever.

It is further ordered, adjudged, and decreed that the plaintiff shall take nothing by this action and that defendant The Cœur d'Alene Railway and Navigation Company have and recover of and from the plaintiff its costs of suit herein, taxed at — dollars.

Done in open court this 5th day of January, A. D. 1889.

By the court:

JOHN L. LOGAN, *Judge.*

108 A true copy.

Attest my hand and the seal of said district court this 5th day of January, A. D. 1889.

F. H. GRIERSON, *Clerk*,
[SEAL.] By BARRY N. HILLARD, *Deputy*.

(Endorsed:) 293. District court of the first judicial district of the Territory of Idaho in and for Shoshone county. The Washington and Idaho Railroad Company *vs.* The Cœur d'Alene Railway and Navigation Company *et al.* Judgment. Filed January 5th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

In the District Court of the First Judicial District of the County of Shoshone, Territory of Idaho.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*, Defendants.

109 I, the undersigned, clerk of the district court of the first judicial district of said Territory in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 64, and I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 5th day of January, 1889.

[SEAL] F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD,
Deputy Clerk.

(Endorsed:) 293. District court of the first judicial district, county of Shoshone. The Washington and Idaho Railroad Company, plaintiff, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, defendants. Judgment-roll. Filed January 5th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on January 7th, 1889, plaintiff's bill of exceptions were filed, which are in words and figures as follows, to wit:

110 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendants.
} Bill of Exceptions.

Be it remembered that at the time this cause was submitted to the court the plaintiff requested the court to find specifically upon

certain facts and as to whether or not the facts in the paper endorsed in this cause with the title of the cause, and further endorsed, "Facts submitted by the plaintiff to be found by the court," and further endorsed, "Refused to find on the point of form and because already sufficiently found. John L. Logan, judge;" which said paper — in the words following, to wit: The clerk will here insert a copy of said paper.

And the court refused to find upon any of the facts set forth in said paper as requested by plaintiff; to which refusal of the court to find upon all of the said facts or any of the said facts indicated in the paper the plaintiff, upon the announcement of the court in its decisions in this case, duly excepted and now excepts.

Plaintiff especially excepts to the refusal of the court to find upon the 4th question of fact requested by the plaintiff in said paper.

And upon the 5th request, as a matter of fact to be found
111 upon on the trial of this case, the plaintiff introduced in evidence a map marked "Exhibit A," filed with the Secretary of the Interior and bearing certain certificates, and the plaintiff excepts to the refusal of the court to find upon the said 5th statement requested by the plaintiff to be found upon, and asks that a copy of the map be engrossed herewith and made a part of this record.

Plaintiff especially excepts to the refusal of the court to find upon the 6th question of fact submitted by the plaintiff, plaintiff having introduced in evidence on the trial of the cause a duly certified copy of resolutions of its board of directors adopting the line of its railroad as indicated on the map of their line.

Plaintiff especially excepts to the refusal of the court to find upon the 7th question of fact submitted by the plaintiff, plaintiff having offered in evidence the said map hereto attached and marked "Exhibit A," with the certificates and endorsements thereon.

Plaintiff especially excepts to the refusal of the court to find upon the 8th question of fact submitted by the plaintiff.

Plaintiff especially excepts to the refusal of the court to find upon the 13th question of fact submitted by the plaintiff to be found by the court, the defendants having offered in evidence a map, hereto attached and marked "Exhibit B," showing the line of its railroad as approved by the Secretary of the Interior.

The plaintiff especially excepts to the refusal of the court to find upon the 14th question of fact submitted by the plaintiffs to be found by the court.

112 Plaintiff especially excepts to the refusal of the court to find upon the 15th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 18th question of fact submitted by the plaintiff to be found by the court.

The plaintiff especially excepts to the refusal of the court to find upon the 19th question of fact submitted by the plaintiff to be found by the court.

Plaintiff further excepts to the refusal of the court to find upon the 20th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 21st question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 22nd question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 23rd question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 24th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 25th question of fact submitted by the plaintiff to be found by the court.

113 Plaintiff especially excepts to the refusal of the court to find upon the 26th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 27th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 28th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 30th question of fact submitted by the plaintiff to be found by the court.

Plaintiff especially excepts to the refusal of the court to find upon the 31st question of fact submitted by the plaintiff to be found by the court.

Plaintiff further excepts to the findings of the court on matters of fact in this cause filed.

Plaintiff further excepts to the conclusions of law by the court in this cause filed.

And plaintiff prays that this its bill of exceptions be sealed by the court and be made a part of the record in this case.

WOODS & HEYBURN,
Att'ys for Plaintiff.

This bill of exceptions is allowed and settled.
Jan'y 5th, 1889.

JOHN L. LOGAN, *Judge.*

114 (Endorsed:) In district court, Shoshone county, Idaho. The Washington & Idaho R. R. Co. *vs.* The Cœur d'Alene R. & N. Co. *et al.* Bill of exceptions. Filed January 7th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I hereby certify that the paper referred to and to be engrossed by the clerk in this bill of exceptions is embodied herein at page 154 of said transcript and including said page up to page 165 of the transcript, with all the endorsements thereon, and is marked on page 154 on the margin thereof, and the same is done by me as and form a part of said bill of exceptions.

Witness my hand and the seal of the district court, first
[SEAL.] judicial district of the Territory of Idaho in and for the county of Shoshone, this 7th day of January, A. D. 1889.

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.*

And afterwards and on January 7th, 1889, notice of appeal
115 herein was filed, which is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*, Defendants. } Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the Territory of Idaho from the judgment and decree therein entered in the said district court on the 5th day of January, 1889, in favor of the defendants in said action and against said plaintiffs and from the whole thereof.

Yours, WOODS AND HEYBURN,
Attorneys for Plaintiff.

Dated January 7th, 1889.

To Albert Allen and William H. Clagett, Esqrs., att'ys for defendants.

TERRITORY OF IDAHO, } ss:
Shoshone County, }

This notice came into my hands after filing thereof by the clerk of this court on the 7th day of January, 1889, and on the same day
I served the same on the within-named defendant, The
116 Cœur d'Alene Railway and Navigation Company, be personally delivering a true copy thereof to William H. Clagett, one of the attorneys for said defendant, at Murray, Shoshone county, Idaho Territory.

THOMAS F. HANLEY,
Sheriff of Shoshone County, Idaho,
By J. L. HACKLEMAN,
Under Sheriff.

Endorsed as follows: 293. In the district court, Shoshone county, Idaho. The Washington and Idaho R. R. Co. *vs.* The Cœur d'Alene R. & N. Co. *et al.* Notice of appeal. Filed January 7th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods and Heyburn, att'ys for plaintiff.

And afterwards and on January 7th, 1889, undertaking on appeal herein was filed, which is in words and figures as follows, to wit:

In the District Court, 1st Judicial District, of the Territory of Idaho in and for the County of Shoshone.

117 THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*, Defendants.
} Undertaking on Appeal Concerning Real Property and Money Damages.

Whereas The Washington & Idaho Railroad Company, the plaintiff in the above-entitled action, has appealed to the supreme court of the Territory of Idaho from a judgment and decree made and entered against it in said action in the said district court in favor of the Cœur d'Alene Railway and Navigation Co. *et al.* on the 5th day of January, 1889, for the recovery of the possession of certain lands and premises therein described, and —— dollars, costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county of Shoshone and Territory of Idaho, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 7th day of January, 1889.

CHARLES HUSSEY. [SEAL.]
ADAM AULBACH. [SEAL.]

118 TERRITORY OF IDAHO, } ss.:
County of Shoshone, }

Charles Hussey and Adam Aulbach, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and freeholder in the county of Shoshone, Territory of Idaho, and is worth the sum in said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHARLES HUSSEY.
ADAM AULBACH.

Subscribed and sworn to before me this 7th day of January, 1889.
[SEAL.] BARRY N. HILLARD,
Notary Public.

Endorsed as follows: No. 293. District court, county of Shoshone. The Washington and Idaho R. R. Co., plaintiff, *vs.* The Cœur d'Alene R. & N. Co. *et al.*, defendants. Undertaking on appeal concerning real property. Dated January 7th, 1889. Filed
119 January 7th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk. Woods & Heyburn, attorneys for appellant.

And afterwards and on January 7th, 1889, præcipe for transcript on appeal was filed, which is in words and figures as follows, to wit:

Præcipe.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO R. R. Co., Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION CO. *et al.*, Defendants. } No. 293.

To F. H. Grierson, clerk:

You are hereby requested to issue transcript on appeal, containing complaint, answer, ans. to affirmative matter in ans., testimony, affidavits — Burrage, Zahner, and Hare, facts submitted to be found by court, findings of fact & law, judg't, bill of exceptions, notice of appeal, undertaking on appeal, præcipe.

WOODS & HEYBURN,
Attorney- for Plaintiff.

120 (Endorsed:) No. 293. In the district court of Idaho Territory in and for Shoshone county. The Washington and Idaho Railroad Company, plaintiff, *vs* The Cœur d'Alene Railway and Navigation Co. *et al.*, defendants. Præcipe. Filed January 7th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

121 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

TERRITORY OF IDAHO,
County of Shoshone, } *ss:*

I, F. H. Grierson, clerk of the district court of the first judicial district of the Territory of Idaho in and for Shoshone county, do hereby certify that the foregoing transcript of papers from one to nineteen, inclusive, contains full, true, and correct copies of the original complaint, answer, answer to affirmative matter in defendants' answer, testimony, affidavits of W. H. Burrage, L. G. Hare, P.

Zahner, facts submitted by plaintiff to be found by court, findings of fact and conclusions of law, judgment, certificate to judgment-roll, bill of exceptions, clerk's certificate to bill of exceptions, notice of appeal, undertaking on appeal, journal entry (one), præcipe for transcipt in the case of The Washington and Idaho Railroad Company, a corporation, *vs.* The Cœur d'Alene Railway and Navigation Company *et al.*, now remaining in my office in said court.

And that an undertaking on appeal in due form has been properly filed by appellant.

Witness my hand and the seal of said district court this
[SEAL.] 7th day of January, A. D. 1889.

F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD,
Deputy Clerk.

122 And afterwards, at the January term, A. D. 1889, of the supreme court of Idaho Territory, the following proceedings were had and done herein, to wit:

In the Supreme Court of Idaho Territory.

WEDNESDAY, *January 30th*, 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant and Respondent.
} No. 20. Appeal, First District, Shoshone Co.

This day comes the respondent and moves the court to strike out certain portions of the record herein; which motion was taken under advisement by the court.

In the Supreme Court of Idaho Territory.

FRIDAY, *February 1st*, 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant and Respondent.
} No. 20. Appeal, First District, Shoshone Co.

The respondent's motion to strike out certain parts of the transcript herein, to wit, all between pages 17 and 34; between page 54 and line 5, on page 129; commencing with the word "3d," on page 151, and extending to and including the words "refused, J. L. L.," on page 152; commencing with the words "and afterwards," on page

153, and extending to and including page 163; commencing with the words "and afterwards," on page 170, and extending to and including line 17, on page 178;

123 Also the two maps attached to said transcript, between pages 176 and 177, having been heretofore heard and considered, it is now ordered that those parts of the transcript which are particularly described in said motion, except that portion commencing with the words "and afterwards," on page 170, and extending to and including line 17, on page 178, be stricken out, the court reserving the right to modify this order if any of the portions stricken out are found material to a decision herein.

In the Supreme Court of Idaho Territory.

THURSDAY, *February 7th*, 1889.

WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant and Respondent.
} No. 20. Appeal, First District, Shoshone County.

This day this cause came on regularly to be heard, and, the hearing not being completed, further argument herein is postponed until to-morrow, the 8th inst.

In the Supreme Court of Idaho Territory.

FRIDAY, *February 8th*, 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff and Appellant,
vs.
CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant and Respondent,
} No. 20. Appeal, First District, Shoshone County.

This day, the hearing herein being concluded, the case was submitted and taken under advisement by the court.

124 In the Supreme Court of Idaho Territory.

TUESDAY, *March 19th*, 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY
vs.
CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY.
} Appeal from First District.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and

all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Weir to the effect that the judgment of the court below be modified, and, as modified, be affirmed, Justice Berry dissenting. Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the first judicial district in and for Shoshone county in the above-entitled cause be, and the same is hereby, modified, and, as modified, that the same be affirmed.

125 In the Supreme Court of the Territory of Idaho, January Term, A. D. 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff and Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, a Corporation, *et al.*, Defendants and Respondents.
} Opinion.

Woods and Heyburn, attorneys for appellant.
Albert Allen & Wm. H. Clagett, attorneys for respondents.

126 WEIR, *C. J.:*

This is an appeal from a judgment in favor of the plaintiff against the defendants, in which the plaintiff asks a judgment and decree of this court enjoining the defendant and all persons claiming under it from in any manner entering upon the right of way of the plaintiff at the town of Wallace, in the county of Shoshone, extending in length a mile and a half and in width one hundred feet on each side of the central line of the railroad of plaintiff as surveyed and designated on the ground, and from further constructing said railroad on said right of way, and from interfering with the plaintiff in the peaceable and exclusive possession and occupancy of said right of way, and that the title be decreed in the plaintiff as against the defendant.

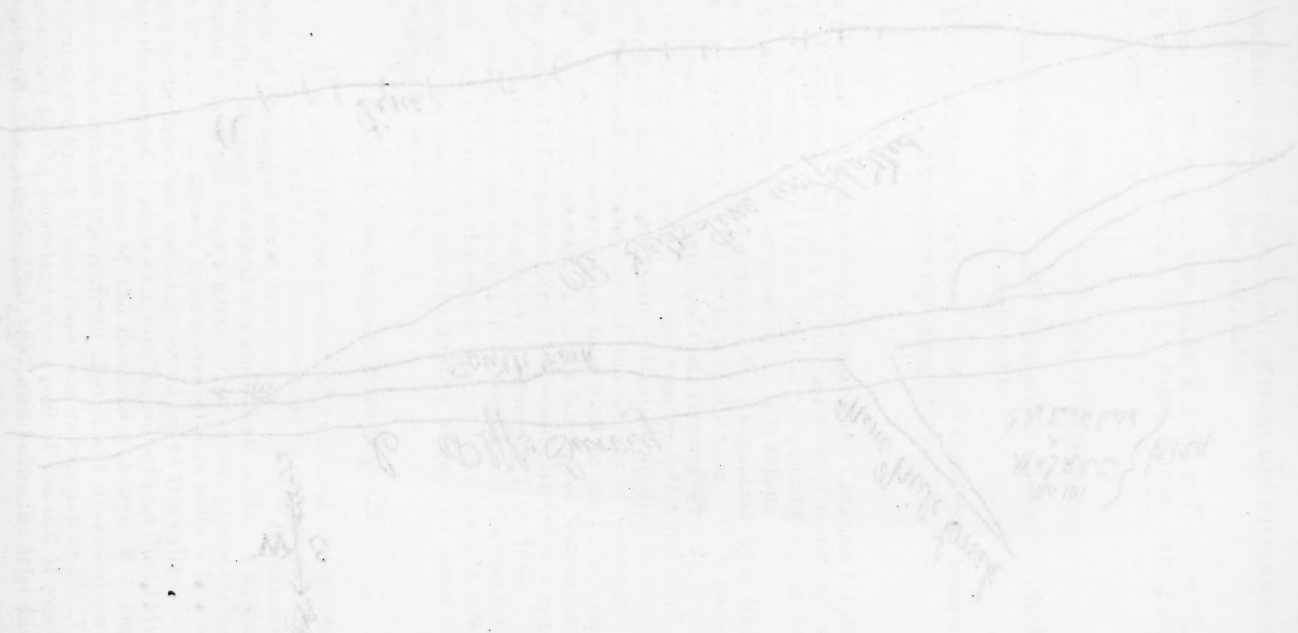
It therefore appears that this action is for a final judgment of injunction in favor of the plaintiff and against the defendant.

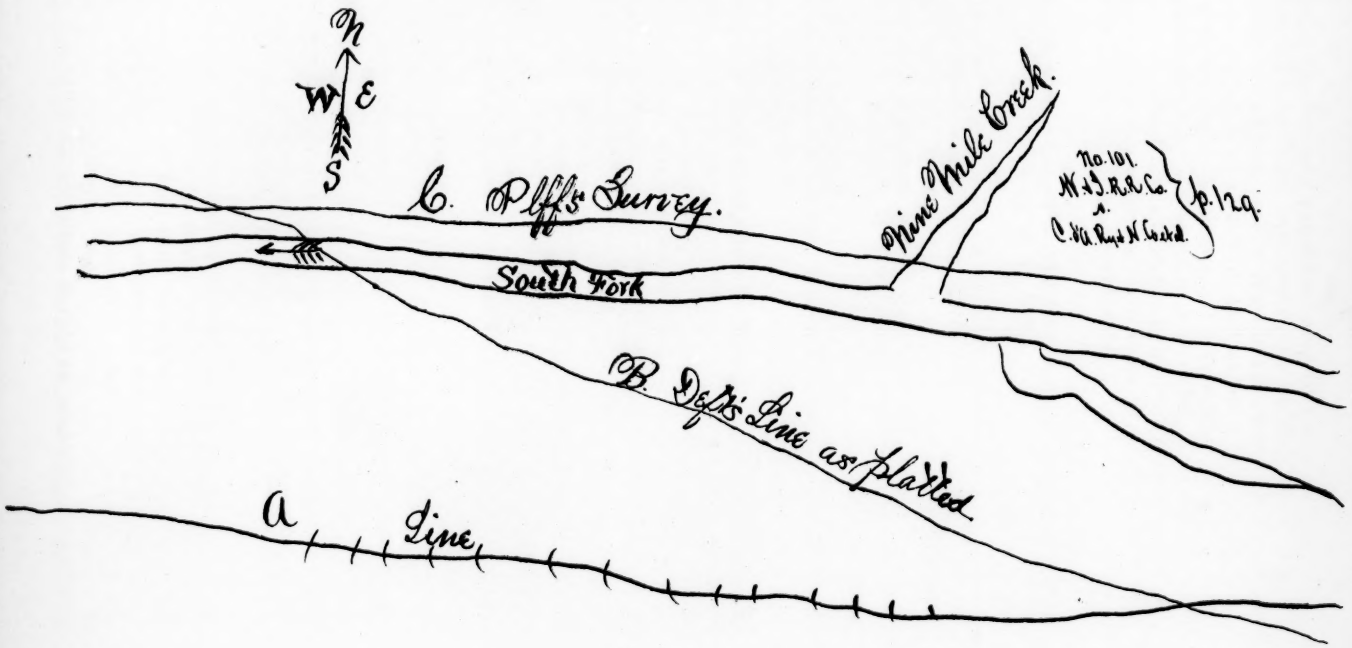
An answer was interposed by the defendant, and, upon issues framed, the cause came on for trial. A preliminary injunction was granted in this cause, but was subsequently vacated upon motion.

It appears from the findings in this case that at the time of the trial thereof the defendant had completed its line of road over the disputed ground and was in the actual use and occupation of the same.

127 The plaintiff, it would seem, had an adequate remedy at law if its contention is correct, and the court below was right in refusing a judgment of perpetual injunction, as prayed for; but we think that the court should not in that case have passed upon the ownership and title of the premises in question, but should have left the plaintiff to his action at law.

The judgment of the court below should be modified as we have

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C. Plff's Survey.
Pine Mile Creek.
No. 101.
M. & J. R.R. Co.
v.
C. W. & Rapt. M. Co. et al.
p. 129.
South Fork
B. Deft's Line as platted
A Line

stated, and, as modified, the same is affirmed, without costs to either party in this court or in the court below.

[Endorsed:] Washington and Idaho R. R. Co. *vs.* The Cœur d'Alene R. & N. Co. Opinion. Weir, C. J. Filed March 19th, 1889. S. H. Hays, clerk.

128 Supreme Court, Idaho Territory.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff and Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, Defendant and Respondent.

BERRY, *Justice*, dissenting:

The plaintiff is a company duly created and organized under the laws of Washington Territory for the purpose of constructing and operating a railway in Idaho Territory, including on its line the premises more especially in question in this action.

The defendant is also a company duly organized for a like purpose under the laws of the Territory of Montana. Both parties began their survey of this section of their respective roads, as appears by the findings of the court, on the same day, October 22nd, 1886, and completed their surveys—the plaintiff on the 8th day of December, 1886, and the defendant on the 5th day of November, 1886. The plats of the respective roads were filed in the U. S. land office in said district—the defendant's on the 8th day of November, 1886, and the plaintiff's December 23rd, 1886—and certified and approved by the Commissioner of the Interior February 11th, 1887.

The plats in each case showed the center line of the route claimed by each. At a point on the South fork of the Cœur d'Alene river the lines of the roads as marked on the respective maps diverge from each other as follows:

(Here follows diagram marked p. 129.)

130 The plaintiff's line is marked "C," and the defendant's line is marked "B." The premises in controversy are from the point of crossing of these two lines "C" and "B," eastward up the stream, a distance of about one and a half miles. The valley of the South fork of the Cœur d'Alene river at this place is alleged by the defendant in its answer to be about 80 rods wide. The stream appears to run near the northern boundary of the valley.

After the respective plats were duly approved and filed July 11th, 1887, the chief engineer of the defendant, George P. Janes, by a written notice, advised the plaintiff that it was the intention of the defendant to construct its said road "on its location as filed." It is also admitted by the defendant and a part of the bill of exceptions allowed herein that August 23rd, 1887, and before the defendant had

begun work on the premises in question, the plaintiff delivered to the defendant the following notice:

"ENGINEER'S CAMP, W. & I. R. R. Co.,
(*July* 13*th*),
August 23*rd*, 1887.

To George P. Janes, engineer in charge, Cœur d'Alene Railway and Navigation Co.

DEAR SIR: You and all parties in your charge or in the employ of the Cœur d'Alene Railway and Navigation Company are hereby notified that the Washington and Idaho Railroad Company, a corporation organized under the laws of Washington Territory and authorized to transact business in Idaho Territory, has heretofore duly filed complete maps of its branch line from Old Mission
131 to Mullan, Idaho, under the act of Congress approved March 3d, 1875, entitled 'An act granting the right of way to railroads through the public lands,' and having complied with the rules and regulations of the Hon. Department of the Interior, the said maps were duly approved by the said department, and a right of way through the public domain secured by said company.

Therefore, you and all servants and employees and privies of the Cœur d'Alene Railway and Navigation Company are warned to desist from occupying any portion whatever of the said Washington and Idaho Railroad Company's right of way as the same is staked out and surveyed and as shown by its said maps now on file.

THE WASHINGTON AND IDAHO
RAILROAD COMPANY,
By W. H. BURRAGE, *Engineer in Charge.*"

That after the interchange of notices the defendant entered upon the route on plaintiff's map marked line "C," and was in process of constructing its road along said line "C" when this action for an injunction was begun.

The main question is as to which of these companies is the owner of this right of way at the place in dispute. Both companies claim it under the act of Congress of March 3rd, 1875, granting to railroads the right of way through the public lands of the United States. Section one provides: "The right of way through the public lands of the United States is hereby granted to any railroad duly organized under the laws of any State or Territory which shall
132 have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

Section 3 authorizes the territorial legislature to provide for the manner in which private lands and possessary claims on public lands of the United States may be condemned, etc.

Section 4. "Any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be on surveyed lands, and if upon unsurveyed lands, within twelve months after the sur-

vey thereof, by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and, upon approval thereof, by the Secretary of the Interior, the same shall be noted upon the plats of said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said road."

This is not a grant to any particular railroad company, but it is an offer to all companies otherwise entitled which shall comply with the conditions of the act. When complied with, it is only operative to the extent of one hundred feet on each side of the central line of said road, subject to the condition that if, after such compli-
133 ance, the road shall not be built within five years the rights granted shall be forfeited as to such uncompleted parts of said section. The act of location must define the center of the right of way.

To every grant of this nature there must be two parties—the grantor and the grantee. The United States is the grantor and the company claiming is the grantee. When the act has passed Congress something else remains to be done. The rights granted must be made definite through the supervision and approval of the Department of the Interior. That is the plain intent of the act, though the Secretary of the Interior may not by any merely captious refusal to approve a location defeat the objects of the act. It is for the purpose of having the rights not only of applicants under the act defined, but also that ungranted privileges may be known both to the United States authorities and to other claimants that the rules and regulations of the Interior Department of November 7th, 1879, were adopted.

Rule 1st and all of its subdivisions are merely directory and as to what evidence the Government will require as to the corporate existence of the claimants.

Rule 2 prescribes that upon the location of any section of the line of route of its road not exceeding twenty miles in length the company must file with the register of the land district in which said section of the road or greater portion thereof is located a map for the approval of the Secretary of the Interior showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys. The map must be filed within twelve months after the location of such portion of the
134 road if located upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof. This, too, is directory and a condition on which the department will act.

Rule 3 prescribes what acts are required before it will consider the location as fixed as between the claimant and the Government and the other claimants from the Government.

Rule 4. "Should the company desire to construct its road over lands prior to their survey it must file in manner as heretofore in-

dicated a map of its surveyed route without waiting until the lands are surveyed, and upon approval thereof may proceed with construction; but immediately on survey of the lands over which the road passes the company must also file a map showing the line of route of its road over such lands, in order that the proper notes and records for the protection of its rights may be made."

As this provision was fully and voluntarily acted upon and complied with by both companies in their dealing- with the Government by each making a plat showing its line of route, obtaining it to be approved by the Secretary of the Interior and filing it in the United States Land Office, perhaps nothing more need be here said of the right of the Interior Department to make this or any of these rules; yet its validity is drawn in question by the findings of the court below as being without authority. A grant shall be construed most favorably to the Government. In such case the Government is deprived of no power by implication. The question of its power to prescribe rules is not so much by what authority does the Land Department exercise this right, but, rather, how, if at all, has its exercise been denied. As we have seen, it is proper and
135 necessary that the Government shall always be apprised of the limits of an adverse right or claim of right, and to this end it is proper that its construction of the law, as well as the conditions and limitations of its own acts of consent and approval, should be distinctly known. That, as I understand this rule, is precisely what it does. I do not concur with the court in Oregon in the case of U. S. *v.* Chapin, 31 Fed. Rep., 892, in which rule fourth is held to be without authority and void. It is precisely such apparent abuses of the privileges under the act of March 3, 1875, as are there alleged (and by the demurrer admitted) which made such precautions on the part of the Government necessary. Those rules do not pretend to create rights nor to deny rights granted by Congress, but in this instance, at least, by exercise of a reserved and commonly exercised right of judgment, to put upon the completed compact the construction of the Government. Such construction is the light by which the acts of the department are to be construed and understood. Reference to this right in the head of the Land Department is clearly implied in the act of Congress of March 3rd, 1875, in requiring acts making certain the claim of companies to be done subject to the approval of the Secretary of the Interior. The rule is in the spirit of the law, and I think the court should not have pronounced it void as for want of authority in the head of the Land Department to make it. In other words, I think he had such authority.

Rule 5. "Any variation within the limits of one hundred feet from the center line of the road as located will not be construed as a deviation from such line, but where upon construction it
136 is found necessary to transgress such limits in which the company has right of way the company must at once file an amended map of right of way for approval."

It is enough to say that a plat fixing the location of each line was necessary under the act and rules; that, in view of that necessity

and for the express purpose of complying with the act, and also with such rules, a plat was made by each company, presented to the Secretary of the Interior for his approval and by him accepted and approved, and filed by the company in the office of the register of the proper United States land office. These plats were so made, approved, and filed for the express purpose of fixing the respective lines, and such lines were thereby fixed and made definite and certain. There can, I think, be no question of that. By rule 5th the Government declared that one condition of its approval was that each party should be confined within one hundred feet of the centre line so drawn. Both parties, and also the Government, acted in view of the same statute and rules of the department. The plat of the plaintiff, being subsequent to that of the defendant, was rightfully made to cover the route which the defendant did not follow or touch, and such line followed and appropriated by the plaintiff is the identical line here in question. The plaintiff's selection was confirmed to it by the Secretary of the Interior, and the plaintiff became and was the owner of the right of way marked on the several plats line "C;" but defendant avers that its lines as platted and approved was made by its own mistake to cover the wrong line, and that it really meant to take the line covered by
137 the plaintiff's route; that it surveyed three lines—one marked on the plat appended to its answer and corresponding with the foregoing plat as line "A," running south of the line in controversy about eight hundred feet; one marked on said plats line "B," and south of the plaintiff's line about five hundred feet, and one marked "C," which was the same as that selected by the plaintiff; and that by mistake of its engineer or maker of the plat line "B" was chosen instead of line "C," and claims the right to correct its location by changing its route from "B" to "C." There is no allegation or pretense that the plaintiff had anything to do with the defendant's plat or with its selection or claim of lines, or that the Land Department ever had any information on the subject; neither was the United States or any officer of the United States a party to this action except that involved in its approval by the Secretary of the Interior, nor has there been any attempt to amend the defendant's map of location. "No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them."

Schulenberg *vs.* Harriman, 21 Wallace, 62.

Granting that the defendant did not, in fact, locate on the line which he meant to locate upon, still under the laws of Congress, the rules of the department, on which all the parties acted, the rights so acquired by the plaintiffs cannot be thus set aside. Its rights were no longer inchoate, but had become fixed and vested, and could not be divested but by its own act or by lapse of time. To do so would be merely to take the plaintiff's property without compensation. Were this a canyon or pass where it were neces-
138 sary that both roads should run over the same ground, there are provisions under which both roads might be permitted

to occupy it. But this is not such a case, nor have those means been attempted. Yet the court below adjudged that line "C" was the true line of the defendant and the right of way over the line in question belonged exclusively to the defendant. This was error.

But defendant still insists that, granting the right of way to be in the plaintiff, still the plaintiff was guilty of laches in not apprising the defendant of its claim before the work was done, and that therefore the plaintiffs are estopped. The court below so holds. We think the court in this was also in error. From the situation of the case an estoppel does not arise. The defendant is presumed to know its own route, having itself surveyed the middle route, made its own plat, and procured that plat to be approved and filed in the United States land office as a notice to all others. But had it been made by another, if the defendant did not know what it contained it might have known it by very slight diligence. Again, the plat was a public record in the land office, in the vicinity of this work, and it is hardly conceivable that the defendant should not have referred to its own plat in so important a matter as building a railroad.

But it appears that before any part of this work on the disputed line was performed, and on the 11th day of July, the defendant's chief engineer served upon the plaintiff a notice that the defendant proposed to proceed with the construction of its road according to its own plat; to which the *defendant* replied, referring to the plaintiff's maps and warning the defendants to desist from occu-
139 pying any part of the plaintiff's line as the same is staked out and surveyed and as shown by its maps now on file.

This, with the facts above mentioned, was certainly sufficient to call attention to the record of the location and to repel any presumption of laches on the part of the plaintiff from mere silence or inaction. The plaintiff is not estopped in such case from asserting its claim to its own right of way.

There are other errors assigned, but, from the view I take of the foregoing, it is unnecessary to review them.

It is claimed by the majority of the court that this judgment may be modified so as to avoid the errors in the rulings, findings, and judgment in the court below by denying the injunction prayed for and leaving all questions of the right of the plaintiff to the ownership of the right of way to be determined in another action. But that cannot be done. This court has jurisdiction of the action for that purpose with the others, and the plaintiff demands an adjudication of its rights in this action. It is not competent for the court to deny such determination, nor was the case tried with such end in view. The judgment in the court below should be reversed and the case remanded.

(Endorsed:) The Washington and Idaho Railroad Company *vs.* The Cœur d'Alene Railway and Navigation Company. Dissenting opinion, Justice Berry. Filed March 19th, 1889. S. H. Hays, clerk.

140 In the Supreme Court of the United States.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
versus
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*, Defendants.

UNITED STATES OF AMERICA, *ss:*

W. B. Heyburn, being duly sworn according to law, doth depose and say on oath that he is a citizen of the United States, above the age of twenty-one years, and resident of the county of Shoshone, in the Territory of Idaho; That he is the general solicitor of The Washington and Idaho Railroad Company, the above-named plaintiff.

That he is well acquainted with the property and right of way involved in the controversy between the above-named parties, plaintiff and defendant in the above-stated action; that the said property consists of a right of way about half a mile in length at the town of Wallace, in said county; that the value thereof is more than the sum of five thousand (5,000) dollars.

W. B. HEYBURN.

Sworn and subscribed to before me this 9th day of April, A. D. 1889.

[SEAL.] F. E. LUCAS,
Notary Public.

141 (Endorsed:) The Washington and Idaho Railroad Company *vs.* The Cœur d'Alene Railway and Navigation Company. Filed September 3rd, 1889. S. H. Hays, clerk supreme court, Idaho Territory.

142 In the Supreme Court of the United States.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Appellant,
vs.
THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, a Corporation, *et al.*, Respondents.

Know all men by these presents that we, The Washington and Idaho Railroad Company, as principal, and Charles Hussey and Adam Aulbach, as sureties, are held firmly bound unto the Cœur d'Alene Railway and Navigation Company *et al.* in the sum of five hundred (500) dollars, to be paid to the said The Cœur d'Alene Railway and Navigation Company *et al.*; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 24th day of August, 1889.

Whereas the above-named Washington and Idaho Railroad Company has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the supreme court of the Territory of Idaho:

Now, therefore, the condition of this obligation is such that if the above-named Washington and Idaho Railroad Company shall prosecute its said appeal to effect and insure all damages and costs *and* if it shall fail to make good its appeal aforesaid, then this obligation to be void; otherwise shall be and remain in full force and
143 virtue.

CHARLES HUSSEY.
ADAM AULBACH.

Sealed and delivered in presence of—
F. E. LUCAS,
As to Adam Aulbach.
C. W. HALL,
As to Charles Hussey.

(Endorsed:) The Washington and Idaho Railroad Company *vs.* The Cœur d'Alene Railway and Navigation Company *et al.* August 28th, 1889. This bond is approved. H. W. Weir, C. J. In the supreme court of Idaho. Filed September 3rd, 1889. S. H. Hays, clerk supreme court of Idaho Territory.

144 TERRITORY OF IDAHO, } *ss:*
Supreme Court, }

I, S. H. Hays, clerk of the supreme court of Idaho Territory, do hereby certify that the above and foregoing are full, true, and correct copies of the transcript on appeal to the supreme court of of Idaho, minutes of proceedings had therein in said cause, opinion of the court, dissenting opinion of Mr. Justice Berry, affidavit of value, and bond on appeal to the Supreme Court of the United States and of the whole thereof, together with the endorsements thereon.

Attest my hand and the seal of the supreme court of Idaho this 28th day of September, A. D. 1889.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk Supreme Court Idaho.

(Here follow diagrams marked pages 145 and 146.)

Ex'd Jan'y 18, 1887. G. W. Mc.

UNITED STATES OF AMERICA, } *ss:*
Territory of Washington, County of Whitman, }

P. Zahner, being duly sworn, says he is the chief engineer of the Washington and Idaho Railroad Company; that the survey of the line of route of said road from a point near Osburn, on the South fork of the Cœur d'Alene river, in the Territory of Idaho, county of Shoshone, to the town of Mullan, on the said South fork, same Territory and county, a distance of $12\frac{8}{10}$ miles, was made by him as chief engineer of the company and under its authority, commencing on the 22nd day of October, 1886, and ending on the 3rd day

of November, 1886, and that such survey is accurately represented on the accompanying map.

P. ZAHNER,
Chief Engineer of the Washington and Idaho Railroad Company.

Sworn and subscribed to before me this 28th day of December, 1886.

EDWARD H. KING,
Notary Public.

TERRITORY OF WASHINGTON, }
County of Whitman, } ss:

I, George W. Truax, do hereby certify that I am the president of the Washington and Idaho Railroad Company; that P. Zahner, who subscribed the foregoing affidavit, is the chief engineer of the said company; that the survey of the line of route of the company's road, as accurately represented on the accompanying map, was made under authority of the company; that the said line of route as surveyed and as represented on the said map was adopted by the company, by resolution of its board of trustees, on the 24th day of December, 1886, as the definite location of the road, from a point near Osburn, on the South fork of the Cœur d'Alene river, in the Territory of Idaho, county of Shoshone, to the town of Mullan, on the said South fork, same Territory and county, a distance of $12\frac{8}{10}$ miles, and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefit of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

GEO. W. TRUAX,
President of the Washington and Idaho Railroad Company.

Attest: JULIUS GALLAND, *Secretary.*

J. M. M. A. M.

DEP'T OF THE INTERIOR, *Feb.* 7, 1887.

Approved.

H. L. MULDROW,
Acting Secretary.

239. Department of the Interior, L. & R. R. Div. Received Jan. 11, 1887.

Endorsed on cover: Case No. 14,030. Idaho Territory supreme court. No. 101. The Washington & Idaho Railroad Company, appellant, *vs.* The Cœur d'Alene Railway & Navigation Company *et al.* Filed May 9th, 1890.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.

No. 101.

THE WASHINGTON and IDAHO RAILROAD COMPANY, Appellant,

vs.

CŒUR d'ALENE RAILWAY and NAVIGATION COMPANY, and GEORGE P. JANES, Appellees.

BRIEF FOR APPELLANT.

By J. F. DILLON, W. W. Cotton,
S. SHELLABARGER, and
J. M. WILSON,
Attorneys for Appellant.

Press of McGILL & WALLACE, 1107 E Street N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Appellant,

vs.

CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY, AND GEORGE P. JANES, Appellees.

No. 101.

BRIEF FOR THE APPELLANT.

Statement of the Case.

This suit was commenced in the District Court of the Territory of Idaho by the Washington and Idaho Railroad Company against the Cœur d'Alene Railway and Navigation Company and George P. Janes, for the purpose of obtaining an injunction to prevent the defendants from appropriating a portion of the right of way claimed to have been granted to the appellant by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

The suit came on for final hearing before the Territorial District Court sitting without a jury; and after hearing the evidence, the court made certain findings of fact and conclusions of law, and decreed that the Wash-

ington and Idaho Railroad Company was not entitled to the relief sought restraining the appellees from occupying the right of way in controversy, and also decreeing that the appellee, the Cœur d'Alene Railway and Navigation Company was the owner and entitled to the exclusive possession, occupancy, and use of the lands p premises in controversy, and that the Washington a Idaho Railroad Company had no right, title, or inter in the said land, or any part thereof (Record, p. 55).

From the judgment of the District Court the appell the Washington and Idaho Railroad Company, appeale to the Supreme Court of the Territory of Idaho. The appeal came on for hearing in the Supreme Court, and the judgment of the court below was modified, and, as modified, was affirmed by a divided court, Justice Berry dissenting (Record, p. 63).

The extent of the modification of the decree and the judgment of the Supreme Court is thus stated in the opinion of the Supreme Court (Record, p. 64):

"It appears from the findings in this case that at the time of the trial thereof the defendant had completed its line of road over the disputed ground and was in the actual use and occupation of the same.

"The plaintiff, it would seem, had an adequate remedy at law, if its contention is correct, and the court below was right in refusing a judgment of perpetual injunction, as prayed for; but we think that the court should not in that case have passed upon the ownership and title of the premises in question, but should have left the plaintiff to his action at law.

"The judgment of the court below should be modi ..., as we have stated, and, as modified, the same is affirmed, without costs to either party in this court or in the court below."

Justice Berry dissented on the ground, as appears by his dissenting opinion (Rec., p. 65), that the district court had properly jurisdiction of the suit, and that judgment should have been rendered on the merits in favor of the

Washington and Idaho Railroad Company. From this judgment of the Supreme Court of the Territory this appeal is taken.

The complaint, which will be found commencing at page 2 of the Record, alleges, in substance: That the appellant was a corporation duly organized and existing under the laws of Washington Territory since July 5, 1886, for the purpose, among other things, of constructing a railroad from the town of Milo, in Idaho Territory, to Mullan, in said Territory, which route passed over the premises in controversy; that the plaintiff, prior to the commencement of the action, had complied with the statutes of Idaho requiring foreign corporations to designate a person in the Territory in which its principal place of business is situated upon whom service of process might be had, and that appellant had in all other respects complied with the law of Idaho Territory respecting foreign corporations transacting business therein.

That in pursuance of said objects of its incorporation, for the purpose of obtaining a right of way from the public domain of the United States, wherever its railroad should traverse the same, the appellant, on December 23, 1886, duly filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, and in all other respects complied with the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," and with the rules and regulations of the Secretary of the Interior thereunder. By reason whereof the appellant became entitled to survey, construct, and maintain its railroad across the public lands of the United States along the route thereof, and became entitled to acquire a right of way for such railroad to the extent of one hundred (100) feet in width on each side of the central line of its road through all public lands along said road.

That for the purpose of obtaining such right of way, granted as aforesaid, the appellant caused the central line of its road to be surveyed from Farmington to Mullan, passing over the premises in controversy.

That the surveyed route was duly adopted by the appellant as and for its definite survey and location of its said line of route of its said railroad. That the survey of the section of said line over the premises in controversy was begun October 22, 1886, and completed November 3, 1886.

That immediately after the survey of such section of its road the appellant caused correct maps or profiles thereof to be made, which were duly verified by the affidavit of its chief engineer, as required by the said act of Congress and the rules of the Secretary of the Interior adopted thereunder, and also placed on each of such maps the official certificate of the president of the appellant, attested by the secretary of the appellant, as by said act and said rules required.

That immediately upon the location of such section, and the verifying and certifying the same, the appellant filed said maps with the register of the land office for the district in which such section of said railroad was located.

That thereafter said maps or profiles were duly transmitted to the said Secretary of the Interior, and were duly and unconditionally approved by him on February 7, 1887; that by reason of the premises the plaintiff became the owner of a right of way through all the public lands of the United States to the extent of one hundred (100) feet on each side of the central line of its road as surveyed, and that all the lands through which said line of road was so surveyed between Old Mission and the town of Mullan, including the premises in controversy, were unsurveyed public lands of the United States; that the plaintiff was at the time of the filing of the complaint,

to wit, September 2, 1887, engaged in the preparation and construction of its said railroad on the line as located.

That the appellee, the Cœur d'Alene Railway and Navigation Company, claims to be a corporation created under the laws of Montana Territory, and to be engaged in the construction of a steam railroad from Old Mission along the valley of the South Fork of the Cœur d'Alene River to a point east of Mullan, and that the appellee, George P. Janes, was the chief engineer of the said Cœur d'Alene Railway and Navigation Company, in charge of its construction work.

That for the purpose of annoying and harrassing the appellant and preventing it from constructing its railroad, and for the purpose of unlawfully appropriating the right of way of the appellant to the use of the appellees, the appellees conspired together; and, in pursuance of such conspiracy, on or about the first day of August, 1887, unlawfully and forcibly, and against the consent of the appellant, went upon that portion of said right of way and line of route of the appellant at the town of Wallace, and for a continuous distance easterly and westerly thereof, making in all a distance of a mile and a half, with large numbers of men and teams unlawfully and forcibly took possession and occupancy thereof, and in like manner began the construction of a railroad thereon for the length thereof, and were at the time of the commencement of this suit engaged in continuing such unlawful and forcible possession and occupancy and construction of said railroad; and that by reason thereof were preventing the appellant from the possession and use thereof and from constructing or being able to construct its railroad thereon, and were, by reason of said acts and threatened acts, destroying the appellant's said right of way and rendering the same totally unfit for appellant's railroad, and would continue and consum-

mate all of said threatened acts and things unless restrained by the order of the court.

That the said acts of the appellees would cause the appellant great and irreparable injury and damage, and was in violation of appellant's rights respecting the subject of the action, and if continued would render any judgment obtained by the appellant against the appellees ineffectual.

The appellant prays the judgment and decree of the court enjoining the appellees from in any manner entering upon the said right of way of the appellant at the town of Wallace for the said distance of one and one-half miles, and from further constructing said railroad on said right of way, and from in any manner interfering with the appellant in the peaceful and exclusive possession and occupancy thereof, and with the paramount right of the appellant in the ownership, use, and enjoyment of its said right of way be decreed by the court; and that upon final hearing a perpetual injunction be issued restraining the appellees from doing, or procuring to be done, the acts and things complained of.

On October 26, 1887, the Cœur d'Alene Railway and Navigation Company filed its answer to the complaint. This answer, which will be found commencing on page 11 of the Record, does not deny any of the allegations of the appellant's complaint, but alleges that the Cœur d'Alene Railway and Navigation Company was a corporation existing under the laws of Montana, and had complied with the act of Congress of March 3, 1875, and had located a line of route for a railroad up and along the south fork of the Cœur d'Alene River; and alleges the filing of maps thereof with the register of the proper land office.

The following are the principal allegations contained in the answer as to the survey and location of the appellee's railroad across the premises in controversy, such

facts alleged constituting the only defense of the appellee interposed in this suit:

"Fifth. That in making the said survey and locating the line of route of this defendant's said railroad as aforesaid, the engineer of this defendant, at and near said town of Wallace, surveyed and marked upon the ground three different lines, which three lines are respectively shown upon the map and hereto attached and marked 'Exhibit A' and made a part of this answer, and that said lines are respectively marked upon said map as 'A,' 'B,' and 'C,' and three lines being surveyed by said engineer in order to obtain the cheapest and most practicable route, and that said lines A and B depart from the general line of said railroad at a point about one-fourth of a mile westerly from said town of Wallace and cross the South Fork of the Cœur d'Alene River and run through the said town of Wallace and then recross the said river and join the main line of said road at a point about one-fourth of a mile above said town of Wallace, while 'C' line runs on the north bank of said river opposite the said town of Wallace, all of which will more fully appear by reference to said map.

"Sixth. That it was the intention of this defendant to adopt as its permanent and definite line of road at and near said town of Wallace the said line so surveyed and marked upon the ground by its said engineer, and now designated on the map hereto attached as line 'C,' but that by a mistake of the chief engineer of this defendant, in platting the said maps or profiles so as aforesaid filed with said register of said land office, the said line designated on the map hereto attached as line 'B' was platted instead; that said mistake was not noticed by this defendant, and was never discovered by it until after the service of the injunction herein, and that up to the said time this defendant supposed and believed that it had adopted as the definite line of its road, at and near said town of Wallace, the said survey running on the north bank of said river, and designated on the map hereto attached as line 'C,' and that under said belief, prior to the commencement of this action, and without any knowledge of said mistake, this defendant, at great cost and expense, has fully graded its road over and along said line

'C,' and laid the ties and rails upon about one-half thereof, and has partly erected a depot or station-house and warehouse, and that the said construction by defendant of its said road and station-house upon and over said line 'C' constitute and are the acts, wrongs, and injuries complained of by the plaintiff and none other.

"Seventh. And this defendant alleges that the plaintiff ought not to be heard to complain or maintain this action for the following good and sufficient reasons, to wit: That the plaintiff, as this defendant is informed by the allegations of the complaint and verily believes, did not file with the Secretary of the Interior a certified copy of its articles of incorporation and due proofs of its organization under the same until the 23d day of December, 1886, and that it was not authorized prior to that time to make any survey for or do any act in locating a line of route of or in or toward the construction of a railroad over the public lands, and that the plaintiff has not since the said filing of its said articles of incorporation with the said Secretary of the Interior surveyed any line of route upon or entered upon or done any work upon or expended any money upon the said premises complained of, but, on the contrary, the plaintiff, through its engineers in charge of its works and business, with a full knowledge that this defendant was in good faith constructing a railroad, stood by and permitted this defendant, at great expense, to make and construct a grade for a railroad the entire length of said line 'C,' and to lay the ties and rails on a large part thereof, and yet did not make known to this defendant the fact that plaintiff claimed any rights in the premises whatever, or that it ever intended or expected to construct a railroad thereon; and this defendant alleges that if the plaintiff should ever build a railroad upon or over said line 'C,' as it is alleged in the complaint it intends to do, it can and will utilize a very large portion, if not all, of said work so as aforesaid done by this defendant, and this defendant alleges, upon information and belief, that the plaintiff stood by and did not make known to this defendant the claim of plaintiff, and permitted this defendant to construct said road-bed, and place the ties and rails thereon in order to obtain the benefit thereof, and thereby to greatly damage, hinder, and embarrass this defendant.

"That in surveying the pretended line of railroad by plaintiff described in the complaint, although the same was surveyed long after the survey of this defendant's road, and while this defendant was in good faith constructing its road, the plaintiff, wholly in disregard of the rights of this defendant, has so surveyed its said pretended road as in many places to cross and recross this defendant's road, and that at said town of Wallace, and for more than one mile easterly and westerly thereof, the valley of the said South Fork of the Cœur d'Alene River is near, if not more than one-fourth of a mile in width, and part of which is practical for the construction of a railroad of any kind, and over which a railroad, such as plaintiff alleges it intends to build, can be constructed cheaper and at less expense than over the premises complained of, and yet the plaintiff, wholly in disregard of the fact that there was ample room for the construction of its said pretended railroad without crossing or interfering with the line of this defendant's road, unnecessarily caused its survey to be so made as to cross the line of this defendant's road at a point below the said town of Wallace, and to recross the same at a point a short distance above the said town of Wallace, each of said crossings being made on a very acute angle, and in such manner that if both of said roads shall be constructed and operated there will be great danger of railroad collisions, and the lives of passengers traveling on said roads will be greatly endangered, and that said crossing and recrossing of plaintiff's road at and near the said town of Wallace as aforesaid is without right and absolutely and wholly unnecessary, and ought not in equity and good conscience to be allowed."

After stating the foregoing facts, the answer then prayed that the appellant be decreed not to have any right of way over, or right to the ground in controversy, and that the title thereto be forever quieted in the Cœur d'Alene Railway and Navigation Company.

To the affirmative matters set up in the answer, the appellant, on October 27, 1887, filed its reply, which will be found in the Record, page 16, and denied that the appellant, with full knowledge that the appellee was in

good faith constructing a railroad, stood by or permitted the appellee to make or construct a grade for a railroad the entire length of the line "C," and did not make known to the appellee the fact that the appellant claimed any right in the premises or that it ever intended or expected to construct a railroad thereon, but alleges the truth to be that on the 11th day of July, 1887, George P. Janes, one of the appellees, who was the engineer in charge of the construction work of the Cœur d'Alene Railway and Navigation Company, wrote a letter to the appellant, advising it that it was the intention of the Cœur d'Alene Railway and Navigation Company to construct its road on its location as filed, and that on the 13th day of July, 1887, W. H. Burridge, who was then the engineer in charge of the construction of the railway of the appellant, gave notice in writing to the said George P. Janes, that it was the intention of the appellant to construct its road on the location as made and filed by the appellant, and referred the said George P. Janes to the plat of the same then on file; that at the time of such notices no work of construction or other work had been done on any part of the premises in controversy, being that portion of the line referred to throughout the pleadings and findings as line "C;" that the location of the line of its road by appellant was made before and prior to the entry of the appellee to locate or survey its said line "C;" that at the time of surveying and locating its line over the line "C," or the line in controversy, there were no marks, stakes, posts, or evidences of location of a railroad on or along any part of said line, or on the north side of the south fork of the Cœur d'Alene River, and that in making its survey and location the appellant set stakes and posts such as are usually used to mark the line of location of a railroad, and marked the same, and in addition thereto cut and cleared away the brush and trees along the line so located.

The reply denies that the appellant ever surveyed or located, or attempted to survey or locate, any line of railroad on the north side of the south fork of the Cœur d'Alene River prior to the survey and location of the line of road by the appellant over the ground in controversy, and denies that the appellant can construct its line on the south side of the river between the points in controversy at a less or equal expense compared with the costs of constructing its line on the north side of said river at said point, and alleges that the appellant will be put to great additional expense by reason of the ground on the south side of said river being covered by a townsite, and for the reason that such line would involve the construction of two bridges across the said river and add largely to the curvature of appellant's road, and denies that the crossing of one railroad by another at grade on the angle of departure indicated by the line of location of the roads of the appellant and the appellee, as shown by the maps attached to the pleadings, would be dangerous or unusual.

During the course of the trial before the District Court of Idaho, the appellant requested the court to find upon certain questions of fact upon the material issues, which the court refused to do, and such matters are set forth in the Record, commencing at page 51. At the request of the appellee, the court found certain facts and conclusions of law, which are found in the Record, commencing at page 42. To the refusal of the court to find upon the questions of fact requested by the appellant, and to the findings of fact and conclusions of law made by the court, the appellant excepted and filed its bill of exceptions, which will be found in the Record, commencing at page 56.

In substance, the following facts were found by the district court: That the appellant, since the 5th day of July, 1886, was a corporation organized under the laws

of the Territory of Washington, for the purpose, among others, of constructing a railroad from the town of Milo, along the south fork of the Cœur d'Alene River, to the town of Mullan, in the Territory of Idaho. (Finding 1, Record, p. 43.)

That the appellant duly designated and appointed a person, residing in Nez Perces County, in the Territory of Idaho, in which the principal place of business of the appellant was situated, upon whom service of processes might be made, and in all respects complied with the laws of Idaho Territory respecting foreign corporations transacting business therein. (Finding 2, Record, p. 43.)

That in pursuance of the objects of its incorporation, and for the purpose of obtaining a right of way over the public lands of the United States, the appellant, on the 23d day of December, 1886, duly filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, together with a duly-certified copy of the law of the Territory of Washington, under which said corporation was organized, and in all respects duly complied with the requirements of the act of Congress of March 3, 1875, and the rules and regulations of the Secretary of the Interior thereunder. (Finding 3, Record, p. 43.)

That the appellee, the Cœur d'Alene Railway and Navigation Company, ever since the 6th day of July, 1886, has been a corporation, organized and existing under the laws of the Territory of Montana, for the purpose of constructing a railroad from a point known as "Old Mission," through the valleys of the Cœur d'Alene River and the south fork of the Cœur d'Alene River to the town of Thompson's Falls in the Territory of Montana. (Finding 4, Record, p. 44.)

That on the 20th day of July, 1886, for the purpose of securing the right of way over the public lands for such railroad, the said Cœur d'Alene Railway and Navigation

Company duly filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and in all respects complied with the act of Congress of March 3, 1875. (Finding 5, Record, p. 44.)

That for the purpose of securing it the right of way through the public lands granted by said act of Congress, the said Cœur d'Alene Railway and Navigation Company caused the central line of its railroad to be surveyed from Old Mission to Mullan via the town of Wallace; that the central line of route of its said railroad as so surveyed was marked upon the ground by stakes set in the ground at the end of each 100 feet, in the manner usual and customary in surveying and locating a line of railroad; that in making the said survey and locating the line of route of the said defendant's said railroad for the purpose of obtaining the cheapest and most practical route at and near the town of Wallace, surveyed and marked upon the ground three different lines, all of which, together with plaintiff's line of route, will appear upon the map hereto attached, marked Exhibit "A," and made a part of these findings, two of said lines, marked upon said map as lines "A" and "B" departing from the present constructed line of defendant's road just below the town of Wallace, and running thence across the south fork of the Cœur d'Alene River and through the town of Wallace, and thence in an easterly direction, recrossing said south fork and connecting with the line of defendant's road, as now being constructed near the mouth of Canyon Creek, and the third line running on the north bank of said south fork, and being the line upon which the defendant's railroad is constructed, and which is the ground, premises, and right of way in controversy in this action, and the line described as line "C" on said map, and that the survey by defendant's engineers of the section of defendant's railroad between the town of Wallace

and the town of Mullan, including the line over the premises in controversy, was commenced on the 22d day of October, 1886, and completed on the 5th day of November, 1886. (Finding 6, Record, p. 44.)

That on the 8th day of November, 1886, the Cœur d'Alene Railway and Navigation Company filed with the register of the land office at Cœur d'Alene, Idaho—that being the district in which said line of route is situated—a map or profile of its road from Wardner Junction to the town of Mullan; and that on the 9th day of November, 1886, the Cœur d'Alene Railway and Navigation Company filed with said register of said land office a map or profile of the central line of its road from the town of Wallace to a point about five miles above the town of Mullan, and that each of said maps or profiles were duly verified and certified, in accordance with rule 4 of the rules and regulations of the Department of the Interior relating to rights of way for railroads under said act of Congress, and said maps were approved by the Secretary of the Interior on the 3d of December, 1886. (Finding 7, Record, p. 45.)

That the Cœur d'Alene Railway and Navigation Company intended to, and did, adopt the said line "C" as the definite line of route for its said railroad at and near the said town of Wallace, but that by a mistake of the engineer of said defendant in making said maps or profiles, so to be filed in said land office, the said line B was platted thereon, and that said mistake was not discovered by the defendant or its engineers until the service of the summons and complaint and injunction in this action. (Finding 8, Record, p. 46.)

That for the purposes of obtaining a right of way, as granted by the said act of Congress, the appellant caused the central line of its railroad to be surveyed from Farmington to Mullan, and the central line thereof marked upon the ground by stakes set at the end of each one

hundred feet, said stakes being numbered and marked in the manner usual and customary in surveying and marking a line of route or railroads; that the survey of the section of the road beginning at or near Osborne and extending to Mullan, and passing over the premises in controversy, was begun on October 22, 1886, and completed November 8, 1886, and that that portion of appellant's line of route at or near the town of Wallace, as so surveyed and marked upon the ground, runs along the north bank of the Cœur d'Alene River substantially upon the same line as line "C" of the survey of the Cœur d'Alene Railway and Navigation Company, upon which said company has constructed its road. (Finding 9, Record, p. 46.)

That the appellant caused correct maps or profiles to be made for the purpose of filing the same in the office of the Secretary of the Interior, which maps were duly verified and certified by the affidavits of the chief engineer and president of the appellant, as required by the rules and regulations of the Department of the Interior, and that the line of route so surveyed and so represented by said maps, respectively, were adopted by the appellant by resolution of its board of directors of dates, respectively, December 2, 1886, and December 24, 1886, as the definite location of the line of route of appellant's said railroad, and that the said map of appellant's road from a point near Osborne to the town of Mullan was filed in the office of the register of the land office at Cœur d'Alene City, Idaho, that being the district in which the premises were situated, and that the map of such section of appellant's road was approved by the Secretary of the Interior on February 7, 1887. (Finding 10, Record, p. 47.)

That all of the lands over which the route of both appellant's and appellee's said railroads passed between Old Mission and the town of Mullan were, and are, public

lands of the United States, and that the premises in controversy in this action are unsurveyed public lands. (Finding 11, Record, p. 47.)

That the line of route of appellant's road was not surveyed in any place until after the survey of the line of route of the Cœur d'Alene Railway and Navigation Company over the same section, excepting as to that portion of the line designated on the map attached to the findings as line "C," and that as to said portions designated by line C being the premises in controversy, the appellant's line was surveyed a few days prior to the survey of said line "C" by the appellee; that the appellant's engineers knew that the appellee was engaged in surveying a line of railroad, but so surveyed appellant's road as to cross and recross appellee's line of road in numerous places between said Old Mission and the town of Mullan, and that in surveying the portion of appellant's line near the town of Mullan, designated as line "C," the engineers so surveyed the appellant's line as to cross appellee's line at a very acute angle and to recross the same at the upper end of said line "C;" and that even if appellee's road was constructed upon line "B" at said town of Mullan, as it is contended by the appellant it should have been, the appellant could not occupy or use the premises of said line "C" without making two unnecessary crossings of appellee's railroad, and that such crossings would be expensive to maintain and dangerous in the operation of both roads; that there is abundance of room for the construction of appellant's railroad at or near the said town of Wallace upon a practical line without crossing or interfering with appellee's road as now constructed or with the said line "B." (Finding 12, Record, p. 47.)

That during the summer and fall of 1887, the appellee fully constructed its railroad from Wardner Junction to the town of Mullan, and was operating such portion of its road, and it completely graded its line of road over

and along said line "C," and had laid the ties and rails upon about one-half of said line "C," and had partly constructed a depot and warehouse thereon, and had graded a Y at the upper end of said line "C" at the mouth of Canyon Creek, and had caused to be graded a branch line of said railroad from said Y at the mouth of Canyon Creek to the town of Burke, and was ready to lay the ties and rails thereon for the purpose of constructing a railroad; that all of said work was done by the appellee in good faith, and at the time of grading the said railroad and laying of the ties and rails thereon, and the doing of all the work which was done up to the time of the commencement of the suit, there were no stakes or anything of the kind to indicate that the appellant's line of road had been surveyed over said line "C," and that the appellee did not know that appellant's road had ever been surveyed over said line "C." Neither was the appellee or any of its officers or engineers aware of the fact that the engineer of the appellee had made a mistake and platted line "B" instead of line "C" upon its map thereof filed in the land office, but believed and supposed that said line "C" had been platted upon said map; that during the time of the work of grading and laying the ties upon said line "C," the engineers and attorneys of the appellant, who had the business of the appellant in charge, frequently saw the work of construction of said road going on, and well knew that the appellee was constructing the same over the line that the appellant had surveyed, and well knowing that the work of grading being done by the appellee could be utilized to great advantage by the appellant if it could afterwards succeed in obtaining possession thereof, yet, notwithstanding these facts, the appellant did not make any objection to the occupancy of the said line "C" by the appellee until the service of the injunction in this action, and that the service of the injunction in this action was the first intimation

that the appellee had that the appellant claimed any right whatever to a right of way over said line "C." (Finding 13, Record, p. 48.)

That the survey of said line of road by the appellant over the ground in controversy was made prior to the time when appellant filed its articles of incorporation and proofs of its organization with the Secretary of the Interior at Washington, and that the appellant has not at any time since the making of said survey made any new survey over the ground in controversy, or done any act in locating a line of route or toward the construction of a railroad over the same, and that the appellant has never entered upon or done any work upon or expended any money upon the premises in controversy other than the making of such survey. (Finding 14, Record, p. 49.)

The conclusions of law made by the court upon the findings which have been hereinbefore substantially set forth are the following:

"The court finds the following conclusions of law, namely:

"1st. That the survey of the plaintiff over the land in controversy having been made prior to the time of filing in the office of the Secretary of Interior of its articles of incorporation and proofs of the organization of the plaintiff company, that by the said survey, at the time it was made and at the time of the commencement of this action, plaintiff obtained and had no exclusive right, title, or interest in said premises by said survey for a right of way or otherwise.

"I so find.—J. L. L.

"2d. That by reason of the filing by the defendant in the office of the Secretary of the Interior of a copy of its articles of incorporation and due proofs of its organization, as set forth in the findings herein, and by reason of its survey and construction of its railroad over the lands in controversy, the defendant has acquired a right of way superior to plaintiff's over the same and is entitled to the use and enjoyment of its line of road as constructed over said lands in controversy, and that the plaintiff, by rea-

son of the acts of its engineers, officers, and attorneys in standing by and permitting the defendant to construct its railroad over the premises in controversy without making known to the defendant the claim of the plaintiff thereto, and without making any objections to said work by the defendant, is estopped from now claiming a right of way over the said premises now in controversy.

"I so find.—J. L. L.

"3d. That Rule IV of the circular issued by the Department of the Interior November 7, 1879, relative to rights of way for railroads over the unsurveyed public lands is not required or authorized by the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through public lands of the United States,' but it is wholly without authority and of no binding force or effect.

"Refused.—J. L. L.

"That the various maps or profiles of the lines of route of the railroads of both plaintiff and defendant, filed with the Secretary of the Interior in pursuance of said Rule IV, as well as the approval of the Secretary of the Interior thereof, were wholly unauthorized and of no binding force or effect upon either party.

"Refused.—J. L. L.

"4th. That the plaintiff is not entitled to take anything by this action, and that defendant, the Cœur d'Alene Railway and Navigation Company, is entitled to the decree of this court quieting the title in it to the strip of ground on the line of its railroad, as constructed through and over the land in controversy in this action, and against the plaintiff and all persons or corporations claiming under the plaintiff, and for its costs in this action, and it is so ordered."

Assignments of Error.

First. The Supreme Court of Idaho erred in refusing to determine the rights of the parties and in remanding the suit to the district court with the direction to dismiss appellant's complaint.

Second. The Supreme Court of Idaho erred in refusing

to determine the rights of the parties in this suit and in refusing to grant the appellant an injunction restraining the appellee from interfering with the appellant in the occupancy and use of the right of way granted to the appellant by the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

Third. The Supreme Court of Idaho erred in decreeing that the appellant was not entitled to relief in equity.

Fourth. The district court of Idaho erred in refusing to find upon the thirteenth question of fact submitted by the appellant, namely, did the defendant ever make, certify, and file a map or profile of its line of railroad as the same was surveyed, located, and marked upon the ground with the Secretary of the Interior of the United States for his approval, in the manner and form as in said act of Congress and said rules and regulations of the Secretary of the Interior prescribed and provided to be done; and if defendants did make and file such map or profile, was it over or within 100 feet of the ground in controversy in this action?

Fifth. The district court erred in refusing to find upon the fourteenth question of fact submitted by the appellant, namely, did the defendant ever make or file any amended survey or map of its location so as to include the ground in controversy?

Sixth. The district court erred in refusing to find upon the fifteenth question of fact submitted by the appellant, namely, did the defendant at any time, by resolutions of its board of directors, adopt as the line of its railroad the line indicated upon its map filed with the Secretary of the Interior?

Seventh. The district court erred in refusing to find upon the eighteenth question of fact submitted by the appellant, namely, has the defendant ever filed any map or profile of its line of railroad over or within 100 feet of

line "C" on the map attached to defendant's answer in this case?

Eighth. The district court erred in refusing to find upon the nineteenth question of fact submitted by the appellant, namely, had the defendant, on the 23d day of August, 1887, done any grading for a railroad upon line "C"?

Ninth. The district court erred in refusing to find upon the twentieth question of fact submitted by the appellant, namely, what work, if any, had defendants performed toward constructing a railroad on line "C" on the 23d day of August, 1887?

Tenth. The district court erred in refusing to find upon the twenty-first question of fact submitted by the appellant, namely, did the defendants have notice of the filing and approval of the map or profile of the plaintiff's road by the Secretary of the Interior of the United States on August 23, 1887?

Eleventh. The district court erred in refusing to find upon the twenty-eighth question of fact submitted by the appellant, namely, did the defendant construct or start to construct its road upon line "C" by reason of the mistake as to the location of their road as indicated by their map filed; if so, when was the mistake first discovered by it?

Twelfth. The district court erred in refusing to find upon the thirty-first question of fact submitted by the appellant, namely, did defendants continue to construct its road upon line "C" after it was advised that such line belonged to plaintiff, and was not the line upon which it had filed its map?

Thirteenth. The district court erred in failing to find the fact set forth in appellant's thirty-first request for findings, to wit, that no proceedings have been commenced by or on behalf of defendant to procure the right of way on line "C," being as follows:

"That the defendant intended to and did adopt the said line 'C' as the definite line of route for its said railroad at and near said town of Wallace, but that by a mistake of the engineer of said defendant in making said maps or profiles, so to be filed in said land office, the said line 'B' was platted thereon, and that said mistake was not discovered by the defendant or its engineers until the service of the summons and complaint and injunction in this action."

Fourteenth. The district court erred in making that portion of the ninth finding of fact which states that the survey by the appellant of that portion of the route in controversy was begun October 22, 1886, and completed November 8, 1886, for the reason that said finding is contrary to the facts alleged in the complaint and admitted by the answer.

Fifteenth. The district court erred in making that portion of the twelfth finding of fact, which reads:

"That in surveying the plaintiff's line from said Old Mission to said Mullan the plaintiff's engineers frequently saw the line of defendant's road as surveyed and marked upon the ground, and knew that defendant was engaged in the construction of its railroad thereon; but that said engineers for the plaintiff in making said survey of plaintiff's road paid no attention to said line of defendant's road as surveyed and marked upon the ground, but so surveyed the line of plaintiff's road as to cross and re-cross defendant's line of road in numerous places between said Old Mission and said town of Mullan, and that in surveying the said portion of plaintiff's line near said town of Wallace, designated as line 'C' on the map hereto attached, the said engineers so surveyed the plaintiff's line as to cross the defendant's line at a very acute angle, and to re-cross the same at the upper end of said line 'C,' and that even if the defendant's road was constructed upon line 'B' at said town of Wallace, as it is contended by the plaintiff it should have been, the plaintiff could not occupy or use the premises of said line 'C' without making two unnecessary crossings of the defendant's railroad, and that such crossings would be expen-

sive to maintain and dangerous in the operation of both roads; that there is an abundance of room for the construction of the plaintiff's road at and near the said town of Wallace upon a practical line without crossing or interfering with the defendant's road as now constructed or with said line 'B.'"

Sixteenth. The district court erred in making the thirteenth finding of fact for the reason that the said finding of fact is not supported by the evidence and is contrary to the evidence, said finding being as follows, to wit:

"That during the summer and fall of 1886 the said defendant fully constructed its railroad from said Old Mission to Wardner Junction over its said line of route, and that during the summer and the fall of 1887 the defendant fully constructed its said railroad over its line of route as so surveyed from Wardner Junction to said town of Wallace, and at the time of the commencement of this action was operating the same with engines and cars in the transportation of freight and passengers, and had completely graded its line of road over and along said line 'C,' and had laid the ties and rails upon about one-half of said line 'C,' and had partly constructed a depot and warehouse thereon, and had also graded a Y at the upper end of said line 'C' at the mouth of Canyon Creek, and had also caused to be graded a branch line of said railroad from said Y at the mouth of Canyon Creek to the town of Burke, and had the material therefor, and was ready to lay the ties and rails thereon for the purpose of operating the same as a railway, and that all of said work done by the defendant in the construction of said railroad was done in good faith, and at the time of grading the defendant's railroad and laying of the ties and rails thereon and doing all the work which it did thereon up to the time of the commencement of this suit there were no stakes or anything upon the ground to indicate that the plaintiff's line of road had been surveyed over said line 'C,' and the defendant did not, nor did any of the officers or engineers of the defendant know that the plaintiff's line had ever been surveyed over said line 'C;' neither was the defendant

nor any of its officers or engineers aware of the fact that the engineer of the defendant had made a mistake and platted line 'B' instead of line 'C' upon its map thereof filed in the land office, but believed and supposed that said line 'C' had been platted upon said map.

"That during the time of the doing of the work of grading and laying ties and rails by the defendant upon the said line 'C' and the construction of its depot and warehouse thereon, the engineers and attorneys of the plaintiff, who had the business of the plaintiff in this county in charge, frequently saw the work of construction of said road and depot and warehouse by the defendant going on, and well knew that the defendant was constructing the same over a line that the plaintiff had surveyed, and well knowing that the work of grading being done by the defendant could be utilized to great advantage by the plaintiff if it could afterward succeed in obtaining possession thereof; yet, notwithstanding these facts, the plaintiff did not, nor did any of its engineers or officers or attorneys, make any objection to the occupancy of said line 'C' by the defendant or to its constructing its railroad thereon until the service of the injunction in this action, and that the service of the injunction in this action was the first intimation that the defendant had that the plaintiff claimed any right whatever to a right of way over said line 'C.'"

Seventeenth. The district court erred in making the first conclusion of law, for the reason that the said conclusion of law is not supported by the finding of fact, and is contrary to law, said conclusion being as follows, to wit:

"That the survey of the plaintiff over the land in controversy having been made prior to the time of filing in the office of the Secretary of the Interior of its articles of incorporation and proofs of the organization of the plaintiff company, that by the said survey, at the time it was made and at the time of the commencement of this action, plaintiff obtained and had no exclusive right or title or interest in said premises by said survey for a right of way or otherwise."

Eighteenth. The district court erred in making the second conclusion of law for the reason that the said conclusion of law is not supported by the findings of facts and does not relate to matters within the issues in this suit, and is contrary to the facts and is not the law, said conclusion being as follows, to wit:

"That by reason of the filing by the defendant in the office of the Secretary of the Interior of a copy of its articles of incorporation and due proofs of its organization, as set forth in the findings herein, and by reason of its construction of its railroad over the lands in controversy, the defendant had acquired a right of way superior to plaintiff over the same, and is entitled to the use and enjoyment of its line of road as constructed over said lands in controversy; and that the plaintiff, by reason of the acts of its engineers, officers, and attorneys, in standing by and permitting the defendant to construct its railroad over the premises in controversy without making known to the defendant the claim of the plaintiff thereto, and without making any objections to said work by the defendant, is estopped from now claiming a right of way over the said premises in controversy."

Nineteenth. The district court erred in making the fourth conclusion of law for the reason that the said conclusion of law is not supported by the findings of fact and is contrary to law, said conclusion of law being as follows:

"That the plaintiff is not entitled to take anything by this action, and that the defendant, the Cœur d'Alene Railway and Navigation Company, is entitled to the decree of this court, quieting the title in it to the strip of ground on line of its railroad, as constructed through and over the land in controversy in this action, as against the plaintiff, and all persons or corporations claiming under the plaintiff, and for its costs in this action."

To prevent the building of a line of telegraph along a railroad right of way. (Southwestern R. R. Co. *v.* Southern & Atlantic Tel. Co., 46 Ga., 43.)

The rights acquired by a railroad company in a located route prior to the acquisition of title to the land, or a right of way over the same, will be protected against encroachments on the part of other companies.

Contra, Costa R. R. Co. *v.* Moss, 23 California, 323;
Sioux City, etc., R. R. Co. *v.* Chicago, etc., R. R. Co., 27 Pac. Rep., 770;
Rochester R. R. Co. *v.* New York & Lake Erie R. R. Co., 110 U. S., 128;
Titusville, etc., R. R. Co. *v.* Warren, etc., R. R. Co., 12 Philadelphia Reports, 642;
Barre R. R. Co. *v.* Montpelier & White River R. R. Co., 39 Am. & Eng. R. R. Cas., 17.

In Rochester R. R. Co. *v.* New York and Lake Erie R. R. Co. (110 N. Y., 128) an application was made for an injunction to restrain the defendant railway company from constructing a switch across the line of road surveyed and adopted as the route of the plaintiff. No proceedings had been taken by the plaintiff to condemn the right of way across the land in controversy, and no work had been performed upon the same. The court held that the injunction should be granted. In delivering the opinion of the court, Gray, J., says:

"This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power, as is the right substantially to acquire, *in invitum*, the right of way from the land-owner, and any land needed for the operation of its road. In this sovereign power is the source of the franchise which the corporation possesses to construct and operate a railroad, and its grant is for public, and not for private purposes. Public considerations enter into the grant of the franchise, and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map

and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land owner or occupancy, in our judgment it has acquired the right to construct and operate a railroad upon such line, exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects and without violating the obvious intention of the Legislature. The plaintiff's franchises were invaded and its enjoyment of the statutory privileges disturbed by the action of the defendant company in so building tracks upon plaintiff's line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence. (Story, Eq. Jur., 927; Osborn *v.* Bank of U. S., 32 U. S., 9 Wheat., 740, bk. 6, L. ed., 204; Croton Turnpike Co. *v.* Ryder, 1 Johns. Ch., 611; Titusville and P. C. R. Co. *v.* Warren and V. R. Co., 12 Phila., 642; Contra, Costa, C. M. R. Co. *v.* Moss, 23 Cal., 323; Boston and L. R. Corp. *v.* Salem and L. R. Co., 2 Gray, 27.)"

The decision of this court in Railway Company *v.* Alling (99 U. S., 463) is conclusive upon the question as to the right and duty of a court of equity to protect the right of way of a railroad company in the course of construction from the interference on the part of other companies. In that case, the Denver and Rio Grande Railway Company and the Canyon City Railway Company both claimed rights under conflicting grants in the grand canyon of the Arkansas River. The Canyon City Company, by certain officers and agents, took possession of the canyon and undertook to construct its road therein, at the same time commencing an injunction suit against the Denver and Rio Grande Company for the purpose of

restraining the latter from occupying, or undertaking to occupy, the canyon for railroad purposes or from interfering with the Canyon City Company in the construction of its road. The Denver and Rio Grande Company, filed a cross bill in the suit of the Canyon City Company setting up the rights of the Denver Company in the canyon, and also filed its bill for the purpose of obtaining an injunction restraining the Canyon City Company from occupying, or attempting to occupy, the canyon. In the suit instituted by the Denver and Rio Grande Company that company obtained a temporary injunction restraining the Canyon City Company from occupying, or attempting to occupy, the canyon. This injunction was subsequently dissolved or modified. In the suit instituted by the Canyon City Company a decree was rendered recognizing the prior right of the Canyon City Company to occupy the canyon without interference or obstruction in any way on the part of the Denver Company. Appeals were taken in both suits to this court. On such appeals, this court examined into the rights of the two companies and determined that the Denver and Rio Grande Company had the prior right in the canyon, and reversed the decrees, with directions to set aside the order granting an injunction against the Denver and Rio Grande Company, and also setting aside the order dissolving the injunction granted in its favor. As a result of this decision the conflicting rights of the two companies were determined and relief by the way of injunction was granted to the company having the superior right.

Many reasons exist why a court of equity should exercise jurisdiction for the purpose of adjusting and determining rights claimed by two or more railroad companies in the same right of way. Conflicts of this kind, as will be seen by reference to the facts presented in many of the cases cited, lead to attempts on the part of

the company out of possession to take possession of the disputed territory by force and arms. Unless a court of equity has power to step in and restrain such action and peaceably place the company having the superior right in the possession of the premises, then it must be expected that by like force and arms the dispossessed company will undertake to regain possession of the disputed territory.

A court of law can afford no adequate remedy, because the possession regained by a judgment is liable to be lost again by force. Such conflicting rights frequently need to be adjusted, and only a court of equity has the power to grant the necessary orders for the division of the territory between the companies.

Injunctive relief is universally granted private suitors to prevent unauthorized entries upon private property by railway companies (Lewis on Eminent Domain, sec. 631, and cases cited).

The ground of jurisdiction in such cases is thus stated in Lewis on Eminent Domain, section 632:

"It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds, namely, that where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation. The remedy in equity protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedies."

Additional reasons exist why the public franchise of a railroad company which can not be taken under the power of eminent domain should receive like protection

from a court of equity without regard to the question of the existence of legal remedies.

The court having the parties before them, each claiming its right to a public easement, and each claiming that it had certain rights that were prior to those of the other, it was clearly error for the Supreme Court of Idaho not to decide as a question of law the statutory right and grant the equitable relief required to protect the appellant in the enjoyment of that which was clearly its by right.

II.

The Appellant's Rights in Line "C," the Premises in Controversy, are Superior to those of the Cœur d'Alene Railway and Navigation Company.

The appellant and the Cœur d'Alene Railway and Navigation Company both claim rights in a right of way a mile and a half in length, situated near Wallace, Idaho, and referred to in the pleadings and findings as line "C." The district court decreed (Record, p. 55) that the Cœur d'Alene Railway and Navigation Company was the owner, and entitled to the exclusive possession and occupancy of said line "C," and that the appellant, the Washington and Idaho Railroad Company, had no right, title, or interest in said line "C" as a right of way for its proposed railroad. For the purpose of showing that this decree is erroneous, and that the appellant's rights are superior to those of the Cœur d'Alene Railway and Navigation Company, the attention of the court will be called to the facts appearing in the pleadings and findings in regard to the rights of the respective parties.

The premises in controversy, as found by the court (Finding 11, Record, p. 47), were unsurveyed public lands

of the United States. Both parties claimed a right to the right of way by virtue of the grant made by the general right-of-way act of March 3, 1875 (18 Stats., 482).

As appears by the allegations of the answer (Record, p. 13), and by the twelfth finding of fact (Record, p. 44), the Cœur d'Alene Railway and Navigation Company surveyed and marked upon the ground three different lines referred to in the findings and pleadings as lines "A," "B," and "C." Lines "A" and "B" are both on the south bank of the south fork of the Cœur d'Alene River, and line "C" is on the north bank, and is the line across the premises in controversy. The Cœur d'Alene Railway and Navigation Company, on the 8th and 9th of November, 1886, filed with the register of the land office at Cœur d'Alene City maps and profiles of its route verified and certified in accordance with rule four of the rules and regulations of the Department of the Interior, and such maps were approved by the Secretary of the Interior on the 3d of December, 1886 (Finding 7, Record, p. 45). The rules and regulations of the Secretary of the Interior referred to in this finding, and in force during the period when such maps were filed, were issued November 7, 1879, and for convenience are printed as an appendix to this brief. Line "C" was not the line platted upon the map and profile so approved by the Secretary of the Interior, but line "B" was indicated upon said plat, and was the line approved by the Secretary of the Interior (Finding 8, Record, p. 46). The appellee therefore can not and does not claim any rights in the premises in controversy by virtue of the filing with the register of the land office, or the approval by the Secretary of the Interior, of any map showing a route across the premises in controversy.

The appellant in its complaint (Record, pp. 3 to 5) alleges a compliance with the act of Congress of March 3, 1875, the location of its road across the premises in con-

troversy, and the filing with the register of the land office and the approval by the Secretary of the Interior of the map of the appellant's route upon the said line "C," the date of which approval was February 7, 1887. These facts so alleged in the complaint are not denied by the answer and are found by the court. Inasmuch as there is no denial in the answer of these facts alleged in the complaint, such facts are admitted, and any findings on the part of the court inconsistent with such admitted facts must be disregarded.

Walker *v.* Breeme, 67 Cal., 599;
Silvey *v.* Neery, 59 Cal., 97;
In re Doyle, 73 Cal., 564.

It therefore appears that prior to the entry, in July or August, 1887, of the Cœur d'Alene Railway and Navigation Company upon line "C," sought to be restrained in this suit, the Cœur d'Alene Railway and Navigation Company had taken no steps to acquire any right of way upon line "C," but had adopted by corporate resolution line "B," platted the same upon the map, and received, on November 9, 1886, the approval of such map on the part of the Secretary of the Interior; and that the appellant had by proper corporate resolutions adopted line "C" as the line of its location, and had filed in the office of the register of the land office a map thereof; and afterwards, to wit, February 7, 1887, had obtained the approval of such map from the Secretary of the Interior, and was actually engaged in the active construction of its road upon a route a portion of which included line "C."

These admitted facts clearly make the rights of the appellant superior to those of the appellee. The appellee can claim nothing by virtue of any location of line "C" for the reason that it never located line "C" or adopted the same as the line of its route, but, on the contrary, did

locate line "B," adopting the same by proper corporate action, and had on file a map thereof bearing the approval of the Secretary of the Interior. The appellee can claim nothing by virtue of construction, because at the time such construction was commenced the appellant had adopted line "C" as the line of its route, and had procured the approval of a map thereof; and for the further reason that the attempted construction of appellee's road is the very act undertaken to be restrained as unlawful in this suit.

The district court passed upon these admitted facts, among others, and reached the conclusion, as will be seen by reference to the decree, that the rights of the Cœur d'Alene Railway and Navigation Company in and to line "C" were superior to those of the appellant. Three reasons would seem to be assigned in the findings of fact and conclusions of law made by the court why the rights of the appellee in and to line "C" were considered superior to those of the appellant, to wit:

First. That the survey of the appellant's route upon line "C" was made prior to the filing of its articles of incorporation and due proofs in the office of the Secretary of the Interior, and that therefore the appellant had no rights in the premises.

Second. That the mistake claimed by the Cœur d'Alene Railway and Navigation Company in platting its approved map on line "B" instead of line "C" is a sufficient justification for the acts of the Cœur d'Alene Railway and Navigation Company in undertaking to deprive the appellant of the rights conferred upon it by virtue of its prior survey and approved map across the premises in controversy.

Third. That there was laches on the part of the appellant in not informing the Cœur d'Alene Railway and Navigation Company of the prior rights claimed by the appellant in line "C."

These matters will be examined in their order.

a. Priorty of survey and adoption of route.

It is found by the twelfth finding of fact (Record, p. 47), that the survey of appellant's route upon the line "C," the premises in controversy, was made prior to any survey across said premises on the part of the Cœur d'Alene Railway and Navigation Company. This is a specific finding of fact, and in so far as it may be considered inconsistent with the facts stated in the sixth and ninth findings (Record, pp. 44 and 46), such specific finding must control.

Wardner *v.* Enslen, 73 Cal., 291, 294.

At the time this survey was made, to wit, sometime in November, 1886, the appellant was a corporation duly authorized to construct a railroad, the general route of which would pass over the premises in controversy. (Finding 1, Record, p. 43.)

The articles of incorporation and the due proofs of the incorporation of the appellant thereunder were not filed in the office of the Secretary of the Interior until the 23d day of December, 1886, about six weeks after the time the preliminary survey of the appellant was completed across the premises in controversy. As a result of this fact, the court finds as a conclusion of law (first conclusion of law, Record, p. 49) that the appellant obtained and had no right or interest in the disputed premises by said survey *or otherwise.* This conclusion of law in effect holds that the adoption by appellant of line "C" as the location of its road, act of March 3, 1875, and the approval of appellant's map thereof, were void and conferred no rights upon the appellant.

The appellant was incorporated on July 5, 1886, long prior to the making of this preliminary survey; and the only thing remaining to be done to confer upon it the full benefit of the act of Congress was to file with

the Secretary of the Interior the proofs of its organization and adopt the preliminary survey of its route as the location thereof, and file a map and receive the Secretory's approval of such map. The appellant had a perfect right to adopt the surveys so made as to the location of its route under the general right-of-way act, and until a preliminary survey is adopted by proper corporate act such survey confers no rights of any kind whatsoever.

Railway Company *v.* Alling, 99 U. S., 463, 475;
Morris & Essex R. R. Co. *v.* Blair, 9 New Jersey Equity, 635.

This survey was adopted as the location of appellant's route by proper corporate action on the 24th of December, 1886, after due proofs and articles of incorporation of the appellant were filed in the office of the Secretary of the Interior. (Finding 10, Record, p. 47.)

The rules and regulations of the Secretary of the Interior on the subject of the approval of maps provide (Rule 5) that the certificate accompanying the plat of the line selected by a railroad shall state the date at which the survey was commenced and finished. So that when these maps were presented to the Secretary of the Interior for his approval, he was advised by the certificate upon the face thereof of all of the facts which the district court has said by its findings should render his action nugatory.

The control and direction of the public lands of the United States and of the disposal thereof is largely under the discretionary direction of the Secretary of the Interior, who is invested with certain judicial power to pass upon matters of form and methods of procedure in acquiring rights thereon. His approval of the act of a railroad in locating its line may perfect a grant of absolute title which can not be questioned or defeated by any person other than the Government itself.

In Sioux City Land Company *v.* Griffey, 143 U. S., 41, the court said:

"By these means such a pre-emption right had, in the language of the statute, attached. The land, therefore, did not pass under the railroad grant. It was no matter of interest to the company what became of the title. The Government, the owner of the land, was satisfied with what Griffey had done, took from him its land warrant as payment, and patented the land. Into the bona fides of this transaction, no one but the Government can inquire."

In Schulenberg *v.* Harriman (21 Wallace, 44, 62), this court, after referring to some earlier decisions of the court construing grants which acquired precision as the result of action taken by the grantee and the land officers of the United States, said:

"Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them."

In the case at bar, the Secretary of the Interior was called upon to pass upon the regularity of the proceedings of the appellant in its attempt to comply with the terms of the act of Congress under which it claims. The Secretary passed upon that question with full knowledge, and approved appellant's map, and it is not competent to attack the regularity of his act, except by direct proceedings to annul that act commenced on behalf of the Government.

Steel *v.* Smelting Company, 106 U. S., 447.

Certainly, the acts of the Secretary can not be inquired into in a collateral proceeding by any person who does not claim by a better title, or by a person who does not show that but for the acts of the Secretary such person would be entitled to a patent.

Bohal *v.* Dilla, 114 U. S., 47;
Sparks *v.* Pierce, 115 U. S., 408;
Lee *v.* Johnson, 116 U. S., 48.

Under the pleadings and facts in this case, the Cœur d'Alene Railway and Navigation Company was a mere trespasser upon the line "C," having no rights in and to the same by virtue of any act on its part, or by virtue of any act on the part of the Land Department of the United States.

The appellee, according to the fifth allegation of its answer (Record, p. 13) and the sixth finding of fact of the court, made three surveys, to wit, lines "A," "B," and "C," for the purpose of determining the cheapest and most practicable route. It is not claimed by the answer that line "C" was ever adopted by the defendant as the line of its route; but the allegation of the answer, paragraph 6 (Record, p. 13), is that it was the intention of the appellee to adopt line "C," but that by a mistake line "B" was platted instead. The eighth finding of fact, found in the Record at page 46, in so far as it finds that appellee adopted line "C" is, therefore, outside of the issues, and must be disregarded.

Lang *v.* Spreck, 62 Cal., 146;
Murdock *v.* Clark, 59 Cal., 692;
Green *v.* Chandler, 54 Cal., 626;
Robinson *v.* Pittsburgh R. R. Co., 57 Cal., 447;
City of San Jose *v.* Freyschlag, 56 Cal., 8.

The route along line "B" was adopted by the appellee according to the seventh finding of fact (Record, p. 45), on the 9th of November, 1886, and the map showing

such route was approved by the Secretary of the Interior on the 3d of December, 1886. This map (Exhibit "B," Record, p. 73) bears on its face the certificate of D. C. Corbin, the president of the appellee, to the effect that the line B, indicated thereon, had been duly adopted by a resolution of the board of directors of the appellee.

By virtue of this filing, the appellee's rights became fixed and vested and could not afterwards be changed to the detriment of any third person.

McKeoin *v.* Northern Pacific Railroad Company, 45 Fed. Rep., 466;

Missouri, Kansas, and Texas Ry. Co. *v.* Cook, 27 Pac. Rep., 847;

Pacific Railroad Company *v.* Dunmeyer, 113 U. S., 634;

Sioux City, etc., Land Co. *v.* Griffey, 143 U. S., 35.

It therefore appears that at the time when the maps of the appellant were approved, to wit, February 7, 1887, the Cœur d'Alene Railway and Navigation Company, by proper corporate action, had adopted line "B," had platted the same, and had obtained the approval of the Secretary of the Interior to its map and the grant attached, and was anchored to the definite line indicated by line "B" and therefore can not be shifted. The approval of the map of the appellee upon line "B" was completed by official act, namely, a resolution of its board of directors, and such official act was indicated in the local land office on the very line of appellee's enterprise.

The Cœur d'Alene Railway and Navigation Company, by proper corporate action, never adopted line "C" as the route upon which its railroad should be constructed. The only surveys made by the Cœur d'Alene Railway and Navigation Company were the surveys of the three lines "A," "B," and "C" which, according to the facts

shown in the evidence, were made at or about the same time. A mere preliminary survey not adopted by proper corporate acts gives no rights of any kind whatsoever.

Alling *v.* R. R. Co., 99 U. S., 463, 475;
Morris & Essex R. R. Co. *v.* Blair, 9 N. J. Eq., 635, 645;
Mills on Eminent Domain, section 116.

The appellee, the Cœur d'Alene Railway and Navigation Company, certainly has no right or power to claim the whole three lines "A," "B," and "C" surveyed by it, and certainly can not claim line "C" after having adopted by proper corporate action line "B" and received the approval of a map covering such line. As a result, therefore, the Cœur d'Alene Railway and Navigation Company was, as respects the appellant, a mere trespasser upon line "C," and can not collaterally question the rights of the appellant indicated by the approval of its map by the Secretary of the Interior to occupy said line "C" for the purpose of constructing its railroad thereon.

(*b*) The Cœur d'Alene Railway and Navigation Company can not set aside the rights acquired by the appellant in line "C" by reason of the negligence of the Cœur d'Alene Railway and Navigation Company in adopting line "B" instead of line "C" as the definite location of its route.

It clearly appears from the seventh finding of fact (Record, p. 45), the Cœur d'Alene Railway and Navigation Company, in compliance with the rule 4 of the rules and regulations of the Secretary of the Interior relating to the general right-of-way act, adopted as the line of its route line "B," and filed a map thereof in the office of the Secretary of the Interior, and such map was afterwards duly approved. By virtue of the adoption of line "B" and the filing of its map for the purpose of ac-

quiring the benefits of the grant made by the act of March 3, 1875, the appellee's rights became vested and fixed and could not afterwards be changed at its pleasure, and certainly can not be changed to the detriment of any third person.

McKeoin *v.* Northern Pacific R. R. Co., 45 Fed. Rep., 466;

Missouri, Kansas, and Texas Ry. Co. *v.* Cook, 27 Pac. Rep., 847;

Pacific R. R. Co. *v.* Dunmeyer, 113 U. S., 634;

Sioux City, etc., Land Co. *v.* Griffey, 143 U. S., 35.

It is alleged in the sixth paragraph of the answer (Record, p. 13), that it was the intention of the appellee to adopt line "C" instead of line "B." Prior to the discovery of this error, if any, on the part of the Cœur d'Alene Railway and Navigation Company, the appellant filed its map and was actively engaged in constructing its road upon line "C," the line selected by it at the time of the attempted interference therewith by the appellee.

When parties rely upon the ignorance of others' rights, or upon the ignorance of the fact upon which others' rights have been obtained, the court, before granting them relief, will look into the circumstances of the parties, their means of knowing their rights, and their diligence in inquiring as to them. Corporations, such as the parties to this suit, are represented by skilled men in their various departments, and in no department more so than in its engineering department. Engineering is an accurate science; and, in its application to the location and survey of railroads, the highest order of talent and the highest degree of accuracy is attained. The Cœur d'Alene Railway and Navigation Company in this case was responsible for the acts and mistakes of its engineer, and of its board of directors, and can claim no rights as against the appellant by virtue of such mistake. The

Cœur d'Alene Railway and Navigation Company adopted its line of route and had published that fact to the world by filing in the local land office a duplicate of its map, showing the adoption of line "B;" and the appellant was required to take notice of that fact. Had the appellant located its line on the south side of the Cœur d'Alene River so as to interfere with line "B," the Cœur d'Alene Railway and Navigation Company might and would successfully oppose such action, on the ground that the map filed constituted notice to the appellant of the claim of the Cœur d'Alene Railway and Navigation Company to the line "B."

The error, if any, in adopting the wrong line by the Cœur d'Alene Railway and Navigation Company was not the result of any act or thing done or omitted by the appellant or any of its officers or agents. Equitable jurisdiction in the case of accident will not be exercised against a party who has an equal equity and who is equally entitled to protection with the one who seeks to be relieved from the facts of the accident.

Pomeroy's Equity Jurisprudence, section 829.

A mistake in equity is distinguished from inattention or absence of thought which is inherent in negligence, and the equitable notion of mistake has nothing in common with negligence, and equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.

Pomeroy's Equity Jurisprudence, section 839, and numerous cases cited.

In section 105 of Story's Equity Jurisprudence, it is stated that courts of equity will not grant relief to a party on the ground of accident where the accident has arisen from his own negligence or fault, for in such a case a party has no claim to come into a court of justice to be saved from the consequences of his own misconduct.

No facts are or could have been plead in the answer showing any grounds for the interposition of a court of equity in favor of the appellee as against the appellant on the ground of accident or mistake.

(*c.*) Laches on the part of the appellant.

It is claimed on the part of the Cœur d'Alene Railway and Navigation Company that it is entitled to a right of way upon line "C" as against the appellant, on the ground that the appellant's officers and agents stood by in silence until the road of the appellee was partially constructed upon line "C." It clearly appears from the pleadings, evidence, and findings that the officers and agents of the appellee knew that the appellant was constructing a line of railroad along the Cœur d'Alene River and in the vicinity of Wallace. On July 17th, as appears by Exhibit A attached to the affidavit of W. H. Burrage as part of the Record, page 21, the Cœur d'Alene Railway and Navigation Company, by George P. Janes, its engineer in charge, notified appellant to avoid occupying, in whole or in part, the right of way of the Cœur d'Alene Railway and Navigation Company indicated upon its map filed with the Department of the Interior. A like notice was served upon George P. Janes by Burrage, in charge of the construction work of the Washington and Idaho Railroad Company, as appears by Exhibit B attached to the affidavit of Burrage, and made part of the Record, page 21.

On August 23d a like notice was served upon Janes by the Washington and Idaho Railroad Company, calling the attention of Janes to the map of the Washington and Idaho Railroad Company filed under the act of Congress (Record, p. 11). It is admitted by Janes (Record, p. 35) that at the time the first notice was served the only work done upon the disputed ground was that the Cœur d'Alene Company had cleared a portion of it. It appears by the twelfth finding of fact (Record, p. 47) that

appellant's route on line "C" was surveyed prior to the time of any survey on the part of the appellee. At the time, therefore, the first survey upon the premises in controversy was made by the Cœur d'Alene Railway and Navigation Company its engineers noticed, or could have noticed, the stakes of the prior survey made by the appellant three or four days before. It is admitted by Mr. Janes, the engineer in charge of the construction work of the appellee (Record, p. 35), that when the appellee commenced construction upon the disputed territory it found the line of stakes of the appellant along and adjacent to the road-bed which the appellee was then constructing. It also appears, by the admission of Mr. Janes, that the only work of construction being done by the appellee at the time of the service of the injunction was the construction of its road near Wallace, and that nothing had been done in the way of constructing a line or grading for a line from Wallace to the Indian reservation near Mission. It would appear, therefore, that the construction work done on the disputed territory by the appellee was not part of the continuous line, and that such work was prosecuted for the sole and only purpose of acquiring the possession of such route in advance of the appellant for the purpose of sustaining the entire lack of right of the appellee in and to the premises. Both companies had filed maps under the general right-of-way act, and such maps had been approved. Each company, according to the evidence, called attention of the engineer of the other to the line of route indicated upon such approved maps. The very object of the filing of such maps is to give notice to the world of rights claimed under the general right-of-way act, and in view of the fact that the engineer in charge of the construction work of the Cœur d'Alene Railway and Navigation Company had his attention definitely and specifically called to the map of the Washington and Idaho on file, there

can be no claim of excusable ignorance on the part of the Cœur d'Alene Railway and Navigation Company in constructing its road upon line "C," and no claim of laches on the part of the Washington and Idaho Railroad Company in taking proper steps to protect its rights in the disputed premises.

The whole claim of the appellee as to mistake and laches is founded solely upon its own negligence in failing to adopt line "C," if it intended to do so, and upon the willful ignorance of its engineers in failing to pay any attention to the notices received of appellant's superior rights in line "C."

III.

The District Court erred in refusing to pass upon the Material Questions of Fact submitted by the Plaintiff.

As appears (Record, p. 42), the suit came on for trial by the court, a jury having been waived by oral consent under the procedure adopted by sections 4405 to 4409 of the Revised Statutes of Idaho of 1887. The findings of fact were not waived by either party, but, on the contrary, the court undertook to find the facts. Under the system of expressed findings in force in Idaho no finding is implied, but full findings are required upon every material issue, and if any material issue is left unfound it is a ground for reversal.

Hayne on New Trials, sec. 239;
Dowd *v.* Clark, 51 Cal., 562;
Watson *v.* Cornell, 52 Cal., 91;
Dunne *v.* Dunne, 62 Cal., 176;
Rœding *v.* Perasso, 62 Cal., 515;
Learned *v.* Castle, 67 Cal., 42;
Waring *v.* Freear, 64 Cal., 55.

It is alleged in the appellant's reply to appellee's answer that on the 23d day of August, 1887, a notice was served upon the appellees warning them of the rights of the appellants to the ground in controversy, and that at that time the appellee had done no work upon the said line. This allegation is deemed to be denied, and is therefore a material issue going directly to the question of notice on the part of the appellees of the right of the appellant to the question of laches on the part of the appellant. The appellant, by the nineteenth, twentieth, twenty-first, and thirty-first requests for findings (Record, p. 53), specifically requested the court to find upon the fact as to whether or not the appellee, on the 23d of August, 1887, had done any work towards the grading or construction of the railroad of the appellee upon line "C," the premises in controversy. The court expressly refused to find upon such fact. To the refusal of the court to so find the appellant excepted, as appears by its bill of exceptions duly allowed (Record, p. 56). It appears by the affidavit of W. H. Burrage (Record, p. 19) and the notice, Exhibit B thereto attached, that on July 13, 1887, George P. Janes, the engineer in charge of the construction work of the Cœur d'Alene Railway and Navigation Company, was notified of the rights of the appellant in the premises in controversy. This affidavit and the notice thereto attached was made part of the Record by the stipulation appearing on page 42 of the Record. George P. Janes, the engineer in charge of the construction work of the Cœur d'Alene Railway and Navigation Company, testifies (Record, p. 34) that at the time such notice was served the appellee was then approaching the ground in controversy, and had done no work upon the same. If when the appellees had only entered upon the line "C," and had not done any act toward grading or constructing its road, the appellant gave fair warning of its rights over the same, then the appellant can not be

charged with laches in permitting the appellee to proceed with the construction of its road. The appellant was entitled to have the admitted fact of the service of its notice distinctly found by the court as a fact showing conclusively that the appellant was not guilty of laches, as is found in the thirteenth finding of the court. Had the court found upon this fact, according to the proofs of the appellant and the admissions of the appellee, it could not possibly have arrived at the conclusion contained in the thirteenth finding of fact that the appellant was guilty of laches, nor could it have arrived at the conclusion that the appellee did not know of the claim of the appellant to the right of way in controversy until the service of the injunction.

On the ground of laches the further facts were submitted to the court to be found upon contained in the twenty-second, twenty-third, twenty-fourth and twenty-fifth submissions of fact by the appellant (Record, p. 53) as to the length of time necessary to travel from the place where the trespass was committed to the office of the appellant, where its officers were whose duty it was to protect the rights of the company against invasions, and to the place where the court to whom the application should be made for relief was sitting.

These were material facts to be found upon the issue of laches, if such issue is material in this case.

It can not be maintained that if the trespass was at a place many days' travel from the place where the court was sitting, to whom application for relief should be made, that the court would not take into consideration the time necessary to prepare papers and to reach the court, present the same, and procure the service thereof, in passing upon the question of laches on the part of the appellant.

The court erred in refusing to find upon the thirteenth, fourteenth, fifteenth and eighteenth questions of fact sub-

mitted by the appellant as to whether or not the appellee had ever adopted any location other than line "B," or had ever filed any amended survey or map of location as to include the grounds in controversy.

Under the rules and regulations of the Interior Department in force at the time this controversy arose, the line of railroad located under the act of Congress can not be shifted outside of the limit of one hundred feet on each side of its central line without filing an amended location with the Secretary of the Interior (Rule 5 of the rules printed as an appendix hereto). And this the appellee has not done, nor has it attempted to do. Upon these issues the court refused to find the facts, and its refusal was error.

The district court was asked specially to find by the last part of the thirty-first request for findings whether or not the appellee had commenced proceedings at any time to acquire a right of way over line "C." This was a material issue to be found, inasmuch as it was squarely raised by the pleadings. If the appellant acquired a grant over line "C" and the appellee had taken no steps to acquire a right to the use of that line, the judgment certainly should have been for the appellant.

IV.

The District Court erred in making the Eighth Finding of Fact, for the reason that such Finding of Fact is not within the Issues in this Suit and is contrary to the Evidence.

By the eighth finding of fact the court found that the appellee intended to, and did adopt line "C" as the definite line of route for its railroad at or near the town of Wallace. It is not claimed by the answer that line "C" was ever adopted by the appellee as the line of its route.

The allegation simply is (Record, p. 13) that it was the intention of the appellee to adopt line "C" as the line of its route. The eighth finding of fact, in so far as it finds that the appellee adopted line "C," is, therefore, outside of the issues, and must be disregarded.

Lang *v.* Spreck, 62 Cal., 146;
Murdock *v.* Clark, 59 Cal., 692;
Green *v.* Chandler, 54 Cal., 626;
Robinson *v.* Pittsburgh R. R. Co., 57 Cal., 447;
City of San Jose *v.* Freyschlag, 56 Cal., 8.

The eighth finding of fact is also contrary to the evidence and inconsistent with the third finding of fact made by the court, to the effect that the defendant filed with the Secretary of the Interior the map of its road upon which line "B" was platted. This map (Exhibit B, Record, p. 73) bears on its face the certificate of D. C. Corbin, the president of the appellee, to the effect that line "B" indicated thereon had been duly adopted by a resolution of the board of directors of the appellee.

V.

The district court erred in making that portion of the ninth finding of fact, which states that the survey by the appellant of that portion of the route in controversy was begun October 22, 1886, and completed November 8, 1886.

It is alleged in the complaint (Record, p. 4) that the survey of the line of road of appellant across the premises in controversy was begun October 22, 1886, and completed November 3, 1886. This allegation is not denied by the answer, and any finding inconsistent with this admission must be disregarded.

Green *v.* Walker, 67 Cal., 599;
In re Doyle, 73 Cal., 564.

VI.

The district court erred in making that portion of the twelfth finding of fact, set forth in the fourteenth assignment of error herein, for the reason that the facts found are immaterial and should not be considered in this suit.

The only premises in controversy in this suit are those covered by line "C," namely, a right of way one and one-half (1½) miles in length near Wallace. It is entirely immaterial, therefore, what the appellant's engineers saw in making the survey between Old Mission and Mullan. It is also found distinctly by the same twelfth finding of fact that the appellant's engineers made the first survey upon line "C" across the premises in controversy.

The fact that the appellant's line "C" may cross the appellee's line B at an acute angle, may possibly be a reason why some action in a proper suit might be taken by a court for the purpose of adjusting the rights of the parties in the crossings, but is certainly no reason why the appellee can by force and arms interfere with the construction of the appellant's road upon line "C," to which the appellee can assert no rightful claim.

VII.

The second conclusion of law of the district court is inconsistent with the pleadings, is not supported by the findings, and is contrary to law.

The court found by the second conclusion of law (Record, p. 50), that by reason of the filing by the appellee in the office of the Secretary of the Interior of a

copy of its articles of incorporation and due proof of sits organization, as set forth in the findings, and by reason of its survey and construction of its railroad over the land in controversy, the appellee acquired a right of way superior to the rights claimed by the appellant. This finding is inconsistent with the pleadings. The appellee did not claim by its answer to have constructed its line upon the route adopted by it by corporate resolution and indicated upon its map, filed and approved by the Secretary of the Interior. It can not claim line "C" by virtue of a prior location, because the right of way adopted by the appellee as its line of definite location is not over the ground in controversy, because the appellee never made any location upon said line "C," but did make a location upon line "B." The appellee can claim no rights in line "C" by virtue of the construction of its road, because prior to the time that such construction was commenced, the appellant, by proper steps lawfully and duly taken, had adopted line "C" as the definite location of its route, had filed a map thereof, and obtained the approval of such map from the Secretary of the Interior.

This conclusion of law is not supported by the findings, and is contrary to law. The only articles of incorporation and due proofs of the organization of the appellee set forth in the findings are those mentioned in findings four and five (Record, p. 44). It appears by finding four that the Cœur d'Alene Railway and Navigation Company was a corporation organized and existing under and by virtue of the laws of the Territory of Montana, and hence could exercise no powers in the Territory of Idaho except such as were not prohibited by the direct enactments of Idaho, or by its public policy deduced from the general course of legislation prevailing in Idaho. The act of Congress of March 3, 1875, does not undertake to confer any general powers

upon railroad corporations, but simply makes a grant of right of way to such companies as are authorized by law to construct a railroad across the lands in which the right of way is granted.

CONCLUSION.

The fundamental error committed by the district court was that the court allowed the appellee to shift the location of its road while its maps still remained upon record, and to allow such shifting to take effect as of the day when the appellee first made its preliminary survey, never adopted by proper corporate act, across the premises in controversy. Such mere preliminary surveys are not sufficient to prevent rights attaching in the public lands of the United States; otherwise, a railroad company would have a right to hold two or more rights of way two hundred feet in width for one and the same railroad. The appellant, according to the findings of the court, first took the necessary steps to adopt as the lines of its railroad the first survey made by either of the parties across the premises in controversy. As a result of this adoption of the definite location of its route, the appellant filed a map, and such map was duly approved by the Secretary of the Interior; and as a result of such approval the appellant's rights became fixed and vested in the premises in controversy, and can not be disturbed at the instance of a mere trespasser, such as the appellee is admitted to be by its own pleadings and the findings of the court. The appellant's rights are therefore prior, whether the matter is viewed as a matter of priority of survey, or as a matter of priority in the adoption of the location, or as a matter of priority in the approval of the map. The appellant has a right to the premises as its right of way under the general right-of-way act as a result of the approval of its map upon

the line "C," and the appellee has absolutely none, for the reason that the appellee's map, filed with the land officers and approved by the Secretary, vested certain rights in the appellee and exhausted the appellee's power to again take under the general right-of-way act. No facts are shown by the pleadings or the findings whereby the effect of the filing and approval of the appellee's map on line "B" can be set aside and the appellee be decreed to have prior rights in line "C," vested in the appellant as a result of the filing of its prior survey, its prior location, and its approved map.

The decree should be reversed, and the cause remanded with directions to grant the appellant the relief prayed for in its complaint.

J. F. DILLON, W. W. Cotton,
S. SHELLABARGER, and
J. M. WILSON,
Attorneys for Appellants.

APPENDIX.

RULES AND REGULATIONS OF THE SECRETARY OF THE INTERIOR, UNDER GENERAL RIGHT-OF-WAY ACT, ISSUED NOVEMBER 7, 1879, AND IN FORCE DURING THE CONTROVERSY INVOLVED IN THIS SUIT.

"I. Any railroad company desiring to obtain the benefits of the law is required to file—

"*First.* A copy of its articles of incorporation, duly certified to by the proper officers of the company, under its corporate seal.

"*Second.* A copy of the State or territorial law under which the company was organized (when organized under State or territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law.

"*Third.* When said law directs that the articles of association, or other papers connected with the organization, be filed with any State or territorial officer, the certificate of such officer that the same has been filed according to law, with the date of the filing thereof.

"No forms are prescribed for the above portion of the 'due proofs' required, as each case must be governed, to some extent, by the laws of the State or Territory.

"Under the following regulations proper forms will be found herein.

"*Fourth.* The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road, according to the existing law of the State or Territory; and that the copy of the articles filed with the Secretary of the Interior is true and correct.

"*Fifth.* A true list, duly verified by the sworn statement of the president, under the seal of the company, showing the names and designation of its respective officers at the date of the presentation of the proofs at the Department.

"These may be transmitted directly to the Secretary of the Interior, or through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office.

"II. Upon the location of any section of the line of route of its road, not exceeding twenty miles in length, the company must file with the register of the land district in which such section of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands, according to the public surveys.

"The map must be filed within twelve months after the location of such portion of the road, if located upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof. It must bear—

"*First.* Affidavit of the chief engineer of the company (or person employed to make the survey, if the company has no chief engineer), setting forth that the survey of route of the company's road from ———— to ————, a distance of ———— miles (giving termini and distance), was made by him (or under his direction), as chief engineer of the company (or as surveyor employed for the purpose, if such be the case), under authority of the company, on or between certain dates (giving the same), and that such survey is accurately represented on the map. If the affidavit is made by the chief engineer of the company it must be signed by him officially.

"*Second.* Official certificate of the president of the company, attested by its secretary, under its corporate seal,

regarding the person signing the affidavit, either as to his being the chief engineer of the company or as to his employment by the company for the purpose of making such survey; that the survey was made under authority of the company; that the line of route so surveyed and represented by the map was adopted by the company, by resolution of its board of directors of a certain date (giving date), as the definite location of the line of route of the company's road from ——— to ———, a distance of ——— miles (giving termini and distance), and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States.'

"III. It will observed that the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is therefore imperative that proper steps, as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner.

"IV. Should the company desire to construct its road over lands prior to their survey, it may file, in manner as heretofore indicated, a map of its surveyed route, without waiting until the lands are surveyed, and upon approval thereof, may proceed with construction, but, immediately on the survey of the lands over which the road passes, the company must also file a map showing the line of route of its road over such lands, in order that

the proper notes and records for the protection of its rights may be made.

"V. Upon construction of any section of the line of its road the company must file with the register of the proper land district, for transmission to this office, a map of such constructed portion of road, bearing —

"*First.* Affidavit of the chief engineer or person under whose supervision the portion of the road was constructed; that its construction was commenced on —— —— and finished on —— —— (giving dates); that the line of constructed road is accurately represented upon the map, and that it conforms to the line of located route which received the approval of the Secretary of the Interior on ———— (giving date).

"*Second.* Certificate of the president of the company, attested by the secretary, under the corporate seal, that the portion of the road indicated by the map was actually constructed at the time as sworn to by the chief engineer of the company (or person making the affidavit), and on the exact route shown on the map; that in its construction the road does not deviate from the line of route approved by the Secretary of the Interior, and that the company has in all respects complied with the requirements of the act of March 3, 1875, granting right of way through the public lands.

"Any variation within the limits of one hundred feet from the central line of the road as located will not be considered as a deviation from such line, but where, upon construction, it is found necessary to transgress the limits in which the company has right of way, the company must at once file proper map of amended route for approval.

"VI. If the company desires to avail itself of the provisions of the law which grant the use of 'ground adjacent to the right of way for station buildings, depots, ma-

chine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road,' it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the ground desired. Such plat must bear —

"*First.* Affidavit of the chief engineer or surveyor by whom or under whose supervision the survey was made, to the effect that the plat accurately represents the surveyed limits and area of the grounds required by the company for station or other purposes under the law (stating the purposes) in ———, (giving section, township, range, and State or Territory); that the company has occupied no other grounds for station or other similar purposes upon public lands within ten miles of the ground designated on the plat; and that, in his belief, the grounds so represented are actually and to their entire extent required by the company for the necessary uses contemplated by law.

"*Second.* Certificate of the president of the company, attested by the secretary, under the corporate seal, that the survey of the tract represented by the plat was made under authority and by direction of the company by or under supervision of its chief engineer (or person making the survey), whose affidavit is attached; that said survey accurately represents the grounds actually and to their entire extent required by the company for station (or other) purposes in —— —— (giving section, township, range, State, or Territory) allowed by the provisions of the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands; that the company has no station or other grounds upon public lands within a distance of ten miles from the ground represented on the plat; and that the company, by resolution of its board of directors of a certain date

(giving the date), directed the proper officers to present the plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds under the law referred to.

"VII. Registers at the various land offices are directed to require that such papers and maps herein referred to, as may be filed with them for transmission to this office, shall conform to these regulations. Where differences of opinion may arise between themselves and the persons filing papers respecting the proper construction of these requirements, the papers may be transmitted with letter, stating the differing opinions.

"They are also instructed, in any case where information is received by them of the construction of railroads within their districts, of the rights of which they have no official knowledge, to promptly advise this office of the facts in order that proper information or directions in the matter may be given them.

"VIII. Action upon maps filed will be facilitated by presenting them in duplicate. The attention of companies seeking the benefits of this act should be especially directed to this suggestion, as serious delays and embarrassments are often incurred through the inability of this office, owing to its limited clerical force to prepare the necessary copies for transmission to the district offices.

"Very respectfully,

"J. W. ARMSTRONG,

"*Acting Commissioner.*

"DEPARTMENT OF THE INTERIOR,

"*November 7, 1879.*

"Approved: C. SCHURZ, *Sec'y.*"

Office Supreme Court U. S.
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Supreme Court of the United States.

October Term, 1893.—No. 101.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Appellant,

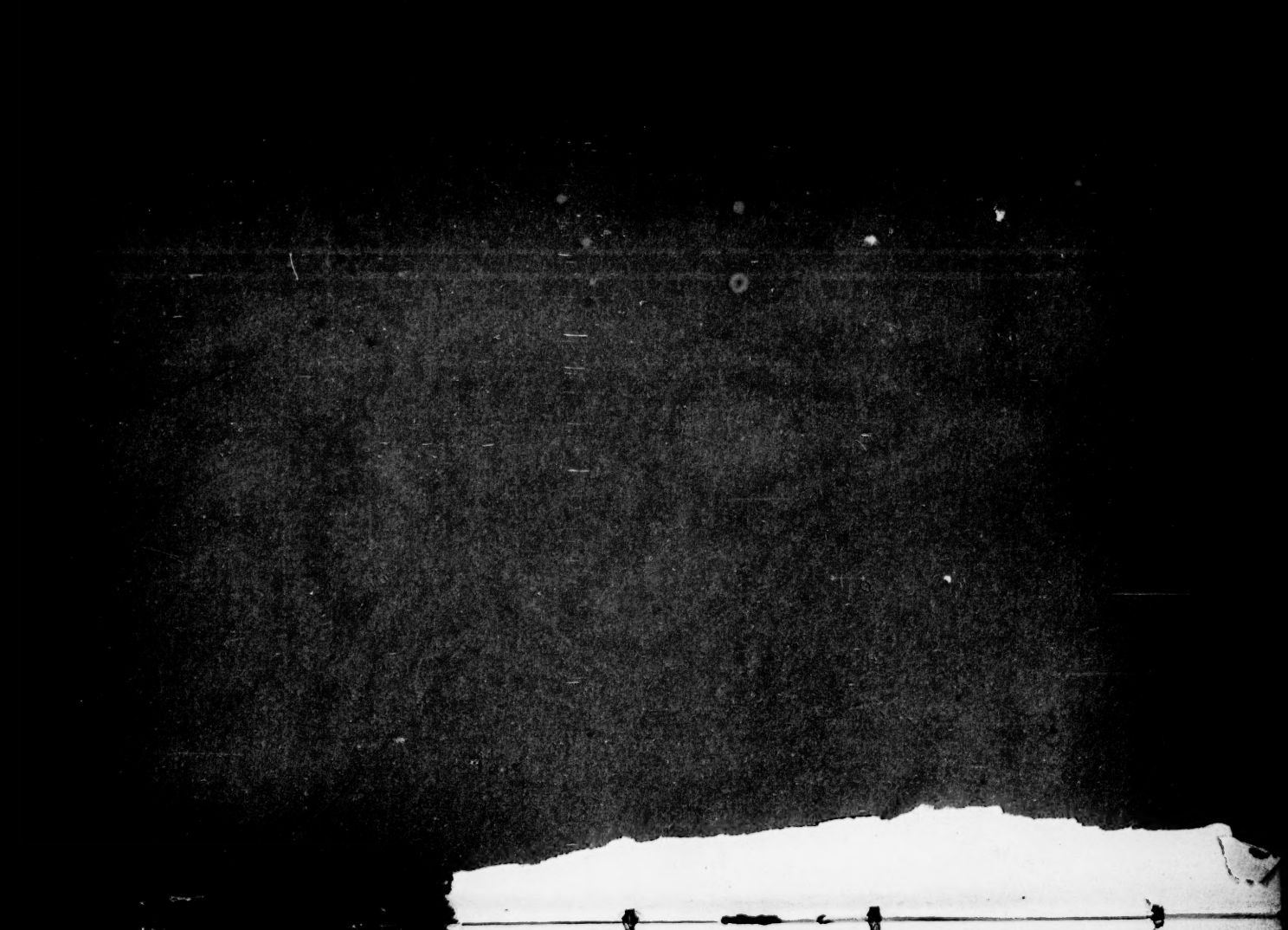
vs.

THE CŒUR d'ALENE RAILWAY AND NAVIGATION COMPANY et al.

Appeal from the Supreme Court of the Territory of Idaho.

BRIEF FOR APPELLEE.

A. H. GARLAND,
For Appellee.



Supreme Court of the United States.

OCTOBER TERM, 1893.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Appellant,

vs.

THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY *et al.*

No. 101.

Appeal from the Supreme Court of the Territory of Idaho.

BRIEF FOR APPELLEE.

This was a bill of complaint filed by the Washington and Idaho Railroad Company against the Cœur d'Alene Railway and Navigation Company *et al.*, wherein (*Rec., p. 2*) it was alleged substantially that appellant was, on the 5th of July, 1886, organized and incorporated for the purpose of constructing and operating a railroad from Farmington, Washington Territory, to Spokane Falls, in said Territory; thence to Mullan, Idaho Territory; thence to Missoula, Montana Territory (*Rec., 3*); that appellant filed with the Secretary of the Interior, on December 23, 1886, copy of its articles of incorporation and proofs of its organization, and in all respects duly complied with the act of Congress granting to railroads right

of way through the public lands of the United States (*Rec., 3*); that appellant surveyed central line of its railroad from Farmington to Mullan, said survey being begun on August 30, 1886, and being completed November 3, 1886 (*Rec 4*); that maps of the respective sections of survey were duly transmitted to the Secretary of the Interior, and were unconditionally approved by him (*Rec., 5*); that appellees, the Cœur d'Alene Railway Company and one Janes, its chief engineer, pursuant to a conspiracy entered into by them, did annoy and harass appellant and obstruct it in constructing its railroad, and unlawfully appropriated appellant's right of way to their own use (*Rec., 6*).

Appellant prayed for decree of court enjoining appellees from entering upon appellant's right of way, and from further interfering in the peaceable and exclusive possession and occupancy of the same by appellant, and that paramount right of appellant in the ownership, use, and enjoyment of its right of way be decreed by the court, and that perpetual injunction be issued restraining appellees from doing or procuring to be done the acts complained of (*Rec.*, 6).

To which complaint appellee filed answer in the nature of a cross-bill, wherein (*Rec., p. 12*) was alleged due organization, on July 6, 1886, under the laws of Montana, of appellee company, for the purpose of constructing a railway from Old Mission, Idaho Territory, to Thompson Falls, Montana Territory; that appellee, on July 20, 1886, filed with the Secretary of the Interior copy of its articles of incorporation and proofs of its organization, and in all respects complied with the act of Congress relating to the rights of way of railroads over public lands (*Rec., 12*); that appellee surveyed central line of its railroad from Old Mission to a point five miles beyond Mullan; that maps of the surveyed portions of their line were filed with the Secretary of the Interior on December 3,

1886 (*Rec., 13*); that appellee, at great cost and in good faith, constructed its railroad from Old Mission to Wallace, Idaho Territory, and at the time of the injunction was operating the same (*Rec., 13*); that appellee, to obtain the cheapest and most practicable route, surveyed three lines, A, B, C, and intended to adopt, as its permanent line of road, line C, but by a mistake in platting maps the line designated as B was platted instead; that appellee never noticed or discovered the mistake until after injunction was served (*Rec., 13*); that appellant should be estopped from complaining or maintaining said action, because appellant was not authorized before December 23, 1886, to survey a line of route over the public lands, and had not, since filing articles with the Secretary of the Interior, surveyed any line, or entered on, or done any work of construction upon, premises complained of, but with full knowledge that appellee was in good faith constructing its road, stood by and permitted it to construct a grade for a road the entire length of line C, and yet did not make known to appellee that appellant claimed any rights in the premises (*Rec., 14*); that although appellant's line was surveyed long after the survey of appellee's road, appellant so surveyed its line as to cross and recross appellee's road in many places, and had at two points crossed and recrossed the same on a very acute angle, and in such a manner that if both roads should be constructed there would be great danger of collision, and lives of passengers would be greatly endangered (*Rec., 14, 15*).

Appellee prayed decree of court that appellant had no right to premises in question; that title be forever quieted in appellee, and that appellant, by reason of standing by and permitting appellee to construct its road over the said line without objection, be decreed to have abandoned and forfeited all right thereto (*Rec., 15*).

To the affirmative matter pleaded in the answer appel-

lant made answer (*Rec., 16*), and denied that with any knowledge whatever appellee was constructing a railroad appellant stood by and permitted appellee to construct a grade for railroad the length of line C, or any line; that on the 13th July, 1887, one Burrage, engineer of appellant, gave notice in writing to one Janes, engineer of appellee, that appellant intended to construct its road on the location made and filed by it, and referred said Janes to plat of same then on file; that no work whatever had been done on line C at time of notice; that appellant located and surveyed its line prior to entry of appellee to locate and survey its line C (*Rec., 16*); denied that the recrossing of one railroad over another at grade on the angle of departure indicated by lines of location of appellant's and appellee's road would be dangerous or unusual (*Rec., 17*).

The cause was tried in the District Court of the First Judicial District of Idaho Territory, before the court, sitting without a jury (*Rec., 42*); and after proof of the respective parties had been heard, and arguments of counsel, and the cause submitted to the court for decision, the court found facts (*Rec., 43*) and conclusions of law (*Rec., 49*), and on January 5, 1889, judgment in the cause was filed (*Rec., 55*), wherein it was decreed by the court that the defendant, the Cœur d'Alene Railway and Navigation Company, was the owner, and entitled to the exclusive possession, occupancy, and use of the land and premises upon which its line of road was then constructed, line C, and that plaintiff, the Washington and Idaho Railroad Company, had no right, title, or interest in said land, or any part thereof, for the purpose of a right of way for its proposed railroad, or for any other purpose whatever.

It was further decreed that the plaintiff should take nothing by its action, and that defendant recover from plaintiff its costs therein. An appeal was taken from

the judgment of the District Court of Idaho Territory, to the Supreme Court of that Territory (*Rec., 59, 60, 61, 62*), and the judgment of the lower court was modified, and as modified, affirmed (*Rec., 64*). Weir, C. J., in his opinion, affirming the judgment of the lower court, held that the plaintiff had an adequate remedy at law if its contention was correct, and that the court below was right in refusing a judgment of perpetual injunction, as prayed for; but that the court should not in that case have passed upon the ownership and title of the premises in question, but should have left the plaintiff to his action at law (*Rec., 64*).

From this judgment an appeal to this court was taken by plaintiff below.

First. We contend the judgment of the Supreme Court of Idaho Territory was correct.

Second. We contend that if the judgment of the Supreme Court of Idaho Territory was erroneous, and the question of title was correctly passed upon by the lower court, the appellee's rights in the premises are prior and superior to those of the appellant, upon appellant's own showing.

The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case depends altogether upon the character of the case, as disclosed in the proceedings.

Watson v. *Sutherland, 5 Wall., 74;*
Hart v. *Albany, 3 Paige, (N. Y.), 213;*
10 Am. & Eng. Enc. of Law, p. 878, and cases cited.

It is a mistaken notion that seems to prevail extensively, that relief by injunction may be had almost in any case, *and as a matter of convenience under the code method of procedure.* On the contrary, it is only to be granted when and where adequate relief can not be had

without it; it is extraordinary and provisional in its nature and purposes.

Ex parte Foster, 11 Arks., 304;
10 Am. & Eng. Enc. of Law, p. 878, and cases cited.

Such being the settled and well-defined principles as to equity jurisdiction, if the appellant in this case had an adequate remedy at law against appellee for the injuries complained of, then we insist there was no error in the judgment of the Supreme Court of Idaho Territory.

From the appellant's own showing, if their contention was correct, it had complete and adequate remedy at law.

1. Appellant contended that it had prior possession of the premises in question, and that appellee was a mere trespasser upon the same. "If the plaintiff had actual *prior possession* of the land, this is strong enough to enable him to recover it from a *mere trespasser* who entered without any title. He may do so by ejectment, or he may maintain trespass." Such is the language of Mr. Justice Curtis, in the case of *Christy* v. *Scott et al., 14 How., 292*, and he cites therein cases sustaining his position. See also *Wilson* v. *Fine, 38 Fed. Rep., 789, and Woods* v. *Banks, 14 N. H., 101.*

Besides, the law is especially declared to be that an equity court will not grant relief by injunction in case of simple trespass, where, for the injury complained of, the parties may obtain adequate satisfaction in the ordinary course of law.

McMillan v. *Ferrell, 7 W. Va., 223;*
Ex parte Foster, 11 Arks., 304;
Livingston v. *Livingston, 6 Johns. (N. Y.), Ch. 497;*
10 Am. & Eng. Enc. of Law, 878, and cases cited.

2. Appellant all along relied upon its superior title to the premises in question, and prayed, in its bill of complaint, that its paramount right and interest be decreed

by the court. In other words, the appellant sought to recover from appellee possession of the premises in controversy, upon appellant's paramount legal title.

The action of ejectment has, by gradual growth, come to be the ordinary method of trying titles to land.

Den Ex dem. v. *Craig, 15 N. J. L., 201;*
3 Bl. Com., 199, 205, 206 (Cooley's 3d Edn.).

Where the plaintiff seeks to recover upon a paramount legal title, ejectment is the proper remedy, and this must be in a court of law.

Fussell v. *Gregg, 113 U. S., 550;*
Hipp v. *Babin, 19 How., 271;*
Lewis v. *Cocks, 23 Wall., 466;*
Killian v. *Ebinghaus, 110 U. S., 568;*
Galt v. *Galloway, 4 Pet., 332;*
Greer et al. v. *Mezes et al., 24 How., 268;*
Apperson & Co. v. *Ford et al., 23 Arks., 747;*
Whitehead v. *Shattuck, 138 U. S., 148.*

3. Notwithstanding that Congress, by its act of 7th April, 1877, provided that the several codes and rules of practice adopted in the Territories respectively, in so far as they authorized a mingling of common law and chancery jurisdictions, or a uniform course of proceeding in all cases, whether legal or equitable, be confirmed, yet this court has held that, "although the Circuit Court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry, and ouster, it is still governed by the principles of pleading and practice which have been established by courts of common law. The hybrid mixture of civil and common law pleadings and practice introduced by State codes can not be transplanted into the courts of the United States." (Mr. Justice Grier, in *Grier* v. *Mezes, 24 How., 277.*) And in the case of *Brown* v. *Rank, 132 U. S., 217*, which was an appeal from the Su-

preme Court of Washington Territory, the question to be reviewed was, "whether the cause should be held as one in equity or at law, and Chief Justice Fuller, speaking for the court, said "the final judgment was one dismissing the action at law, and, upon the pleadings as they stood, was not a judgment in the exercise of chancery jurisdiction. The Supreme Court correctly held that the cause was at law, and not in equity."

From the case last referred to, it is evident that even in those Territories that possess a "hybrid code," in which law and equity are mingled, the common law distinction between chancery and law jurisdiction still obtains.

We respectfully contend, then, that upon the appellant's own showing it had an adequate remedy, and should have brought an action at law, and that the judgment of the Supreme Court of Idaho Territory was correct.

If the judgment of the Supreme Court of Idaho Territory was erroneous, and the question of title was correctly passed upon by the lower court, we submit the appellee's rights in the premises are prior and superior to those of the appellant, and the appellant has no rights in the premises.

The defendant Cœur d'Alene Railway and Navigation Company was organized July 6, 1886, for the purpose of constructing a railroad over the ground in controversy, and the articles of incorporation gave the termini and route of the road. (*Rec., p. 44, 4th finding of fact.*) On July 20th, 1886, it filed in the office of the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization, under the act of Congress granting to railroads a right of way through the public lands of the United States, approved March 3d, 1875. (*Rec., p. 44, 5th finding of fact.*
Supplement R. S. of the U. S., p. 91.)

In the summer and fall of 1886 it constructed fourteen miles of its road, from Old Mission to Wardner Junction, and in October of that year it surveyed its line of road up the South Fork of the Cœur d'Alene river through the town of Wallace, to Mullan, and marked the center line by stakes, and in the summer and fall of 1887 it completed its line of road over the line so surveyed to and through the town of Wallace and over the land in controversy (*Rec., pp. 44–48, 6th and 13th findings of fact*).

At that time the lands in controversy, and all lands along the line, were unsurveyed public lands (*Rec., p. 47, 11th finding of fact*).

These facts alone gave the appellee a complete title to a strip of land one hundred feet in width on each side of the central line of the road under that act of Congress.

This act of Congress provides, "That the right of way through the public lands of the United States is *hereby granted* to any railroad company duly organized under the laws of any State or Territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of central line of said road."

Prior to this act Congress had been besieged with railroad companies seeking right of way over the public lands, and many grants of this kind had been made, and Congress undertook by this general act to give all railroad companies, duly organized, a grant of a right of way.

It was a general grant to all railroad companies that should comply with its terms.

When a railroad company files with the Secretary of the Interior the copy of its articles of incorporation and proofs of its organization, then this general act immediately becomes as to that company a special act, granting to it a right of way over the public lands be-

tween the termini of the road, and over the route designated in the articles of incorporation; it then becomes a grant *in presenti.*

R. R. Company v. *Baldwin, 103 U. S., 426;*
St. Paul, &c., R. R. Co. v. *N. P. R. R. Co., 139 U. S., 1.*

Now, as against this positive right of the Cœur d'Alene Company, acquired by compliance with the act, and by the actual construction of its road upon the land, what has the appellant shown to defeat it?

The appellant has shown that in October, 1886, one W. H. Burrage, with some associates, ran a survey over the land in controversy. This was long before the appellant was organized as a corporation for the building of a railroad to or through the town of Wallace, or to any point in that vicinity nearer than the town of Wardner, fifteen miles distant (*Rec., p. 46, 9th finding of fact, and p. 49, 1st conclusion of law*).

And at this time the appellant had not complied with or attempted to comply with said act of Congress of March 3, 1875 (*Rec., p. 49, 14th finding of fact*).

It would seem a vain matter to contend that such an unauthorized survey, as this made by Burrage, could be the foundation of a right.

In the case of *Belk* v. *Meagher*, 104 U. S., 284, which was an action involving the validity of location of a mining claim on the public lands, Mr. Justice Field, in delivering the opinion of the court, uses this strong language: "The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that would be of no avail."

And then, after commenting upon what had been done, the learned judge says: "As in this case, all these things were done when the law did not allow it; they

are as if they had never been done." And then again, at page 285 of the opinion, he says: "A location to be effectual must be good at the time it was made. When perfected, it has the effect of a grant by the United States, of the right of present and exclusive possession. As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so he may take what the United States has, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give."

It seems to us that this language is particularly applicable to the case at bar. There was no offer of Congress to give a right of way, until the articles of incorporation and proofs of organization had been filed. There was nothing to take until there was an offer to give, as this survey was made when the law did not allow it; it is as if it had never been done.

Belk v. *Meagher, 104 U. S., 284;*
New Briton R. Co. v. *Pittsburgh R. Co., 105 Pa. St., 13;*
25 Am. & Eng. R. R. cases, 158 and note.

In the latter case it was held that a survey and location of a line of railroad made before the company was chartered, by parties who being unincorporated had no legal authority to make such location, was void, notwithstanding, the survey was made by the projectors of the future organization, and that a subsequent adoption of the unauthorized survey by the company after its incorporation did not give it any right to the location.

Counsel for appellant, in their argument below, copied the rules of the Department of the Interior with reference to the right of way act of March 3d, 1875, and called particular attention to rule 4; and then contends that because we undertook to comply with this rule, but in doing so made a mistake in the line platted, which was not discovered until the road, depot, and side track were

constructed on the ground in controversy, we are bound by the map and have no rights in the premises.

In this case of what benefit or service could the maps filed under rule 4 be to the Government or any one else? The land was unsurveyed. The surveys are not connected with any governmental land-mark. There might be a dozen of these maps filed, showing railroad lines running through the same section of the country, and yet no officer of the Government, or any one else, could tell from them whether the surveys conflicted or not. Some of the lines might be laid right on other lines. Not so, however, where the plats are filed after the public survey of the land. Then they would show the section lines, and points of intersection and conflicts would appear.

We contend, however, that rule 4 does not have the effect of law, that the officers had no authority to make it, and that no rights could be acquired under it or lost by a failure to comply with it. A glance at the statute and the rule, we think, will sustain us.

The statute, section 1, grants the right of way over the public lands to any railway company which shall have filed its articles of incorporation and proofs of organization with Secretary of the Interior. And section 4 says that if the road is upon surveyed lands, the profile must be filed *within one year* after the location of any section of twenty miles of the road, and if upon unsurveyed lands within twelve months after the survey thereof.

The rule provides that should the company *desire* to construct its road over lands prior to their survey it may file a map of its surveyed route without waiting until the lands are surveyed, and upon approval thereof *may proceed with construction*—but immediately on the survey of the lands over which the road passes, the company must also file a map showing its line, etc. The first part of this rule makes the right to construct the road depend upon

filing the map and the approval of the Secretary, and the last part of it requires the railroad company to file another map *immediately* upon the survey of the land by the Government; while the statute gives the company one year after the lands are surveyed in which to file a map.

The late Mr. Justice Deady had occasion to pass upon this act and also upon the question of the authority of the Land Department to make rules and regulations under it. The rule construed by him, however, related to the right to take timber, while rule 4 is as to the right of way. But there is no more authority for one than the other.

United States v. *Chaplin, 31 Fed. Rep., 890.*

In this case the learned justice, at page 893, says:

"And now, had the Commissioner of the General Land Office the power to make the regulations in question, or, in other words, to hamper and restrain the company in the assertion of its rights under the act as therein provided? After a careful examination of the matter I am satisfied the regulations are altogether unauthorized. When they coincide with the act they are superfluous, and when they do not, or go beyond it, they are invalid."

And on page 894 he says:

"Nor is there anything in the general powers conferred on the Commissioner that can be construed to give him authority to prescribe rules for the taking of material under this act by railway companies, and particularly to confer on himself the right to determine in advance from where and what quantity of such materials may be taken and used."

This decision is so clear, and being a construction of the act in question here, and the right to make rules under it, that we can not do better than ask the consideration of the whole case.

It must be borne in mind that rules, regulations, and instructions by heads of departments must be according to law—must be within the law, and not outside of it. These departments can not legislate; they can only carry out legislation by rules, regulations, and instructions consistent with such legislation.

Dickson's case, 15 Pet., 161;
Morrill v. *Jones, 106 U. S., 466;*
Symonds v. *United States, 21 C. Cls., 148 S. C., affirmed in 120 U. S., 46;*
Strong v. *United States, 23 C. Cls., 10.*

But how has the appellant been prejudiced by the mistake of the appellee in filing this unauthorized and unnecessary plat?

The survey made by Burrage was unauthorized:

1st. Because appellant at the time was not a corporation organized to build a road there.

2d. Because the appellant had not complied or attempted to comply with the provisions of section 1 of the act of March 3d, 1875.

R. R. Co. v. *Sture, 20 N. W., 230.*

No other survey was made by appellant until 1888, nor did the appellant do anything whatever on the ground until the survey in 1888; in the meantime, in the fall of 1887, the Cœur d'Alene Company had built its track, side track, and depot on the ground.

Nor can the appellant's claim be strengthened any by claiming that what they did in 1888 relates back, because a claim on the public lands can only be said to relate back to the first *valid initial step* taken.

In October, 1886, while appellee company was actively engaged in constructing its road, and surveying and locating its line, a predatory band of engineers, headed by Mr. Burrage, entered the field and commenced surveying a pretended line of railroad between Wardner and Mul-

lan, in the valley of the south fork of the Cœur d'Alene river, and over the same line which the engineers of appellee company were then engaged in surveying, and several days and miles behind the engineers of the appellee company. Burrage and his party in making their survey paid no attention whatever to the lines surveyed and marked by the engineers of appellee, but ran their lines so as to cross and recross in a great many places, and to run upon in a great many places the line surveyed and located by the engineers of appellee; and in the summer and fall of 1887, during the construction of the side track and depot by appellee, appellant stood by and saw it done, and made no objection or claim to the line, but waited until the work was completed before making any claim to the ground. (*Rec. 48, 13th finding of fact.*)

These facts, we think, constitute a clear case of estoppel. He who has been silent when in conscience he ought to have spoken, shall be debarred from speaking when conscience requires him to be silent.

Niven v. *Belknap, 2d Johns., 572;*
The Bank U. S. v. *Lee, 13 Pet., 107;*
Morgan v. *Railroad Co., 96 U. S., 716;*
Wendell v. *Van Rennselaer, 1 Johns., Ch. 354.*

Where a person tacitly encourages an act to be done, he can not afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claims.

Swain v. *Seamens, 9 Wall., 254;*
Morgan v. *R. R. Co., 96 U. S., sup.;*
Merchants' Bank v. *State Bank, 10 Wall., 604.*

"There is no principle better established," said Chancellor Kent, in *Wendell* v. *Van Rennselaer, sup.*, "nor one founded on more solid considerations of equity and